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IT MATTERED TO ME (...and why it should matter to you) A “turning point” (according to you) in your practice of family law in South Carolina

I recently had one of my typically dumb ideas. I have them daily. Fortunately, I don't act on most of them...unfortunately for you, I do act on some.

At my advancing age, and because practicing family law is just a natural sleep-suppressant, I don't sleep very well. Consequently, I have far too much time on my hands to think about how time is moving forward and passing me by, while (in the words of Garth Brooks) I stand upon the shoreline. But I simply couldn't resist trying this latest one because of the pure simplicity of it: I made the following request of both family court judges and family law attorneys:

“Send me one family law statute or one appellate court decision or one family court rule which you believe is or was significant enough to have had a permanent impact upon you and changed (1) [for attorneys] the way you advise your client(s) or prepare for a family court hearing or trial, or (2) [for judges] the way you conduct your courtroom or employ your decision-making process.”

I didn't request that a reason for the choice be provided, and I promised to protect the confidentiality of the sender (unless they gave me express permission to reveal the “source” of the response).

I received 40 written responses and 2 verbal responses, all of which were excellent selections in my opinion. But there were several which were very surprising to me, and several which were truly thought-provoking. Also, a number of attorneys took their time to explain the rationale behind their selection(s), which provided me insight into their thought process.

I sincerely thank all those attorneys who took their valuable time to respond.

As promised, I have taken every response and placed them into the three categories in which they were offered. However, by necessity, I added a fourth category – *Miscellaneous*. And so this might be a possible learning tool for those few family court judges and few family law attorneys who will admit they do not know “all things family law”, I have included the attorneys' rationale in a “comment” to the statutes, appellate decisions, and rules which are referenced by the various selections, below.

Finally, to make it easier, you will find that the family law statutes and family court rules are numbered sequentially, and the appellate court decisions are in alphabetical order.

I can only hope you will find this “work-in-progress” beneficial in some small way to your practice of family law in South Carolina (to paraphrase one attorney – “practicing family law in this State is a constant mystery...and misery!).

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Family law statutes

South Carolina Code Ann. §20-3-130(A)

³⁵₁₇ **Comment:** one that has a strong impact on the practice of family law is the statute barring alimony to an adulterous spouse, without regard to the behavior of the “paying” spouse.

³⁵₁₇ **Comment:** the statutory bar to alimony – it is one of the few black-and-white issues in Family Court....you commit adultery and you do not get alimony.

South Carolina Code Ann. §20-3-610 (Spousal equity and ownership rights).

South Carolina Code Ann. §20-3-620 (Apportionment factors).

South Carolina Code Ann. §20-3-630 (Marital property/nonmarital property).

³⁵₁₇ **Comment:** the statute I would select is the equitable distribution statute, with emphasis on when transmutation occurs. Many judges and attorneys totally skip over the fact that the funds must be so commingled as to be untraceable.

South Carolina Code Ann. §63-3-810, et.seq. (Private Guardian ad Litem Act).

³⁵₁₇ **Comment:** the GAL statute totally changed the way we handle cases when we serve as GAL.

³⁵₁₇ Comment: as an attorney who has a fairly large guardian ad litem practice, I believe that the former role of the attorney GAL in private cases was truly eradicated and redefined by the statutes regarding the duties and responsibilities of GALs. SC Code Section 63-3-830 specifically precludes GALs from making any recommendations regarding custody. So many cases were resolved prior to trial based on the recommendations of GALs prior to this statute. Now I remain in a quandary when I, as an advocate for a child(ren), believe vesting custody in favor of one party over the other is in the child's best interests. Do I abandon the statutory duty as an advocate for the child by remaining silent on the issue of custody?

South Carolina Code Ann. §63-5-20 (Obligation to support).

³⁵₁₇ Comment: I do have a code section that is of interest for the first time in my career. Section 63-5-20!! I was on the short end of the stick in a case where my client had been receiving temporary alimony for a year. No adultery on her part, not even alleged. She had attempted suicide three times during the litigation and two extended stays in a mental health facility following the last two suicide attempts. I had her represented by a GAL. Her mental health provider testified that she was not able to participate in the 'competitive workforce'. Very long term marriage. Wife had not worked outside the home in many, many years. Husband made \$125,000 - \$140,000 per year. Many other factors that I will not go into. My client presented her testimony far more weakly than had been prepared for. Judge decided (under Section 63-5-20) wife had left her husband 'for no reason' and denied her alimony. So, I recommend that everyone look at this statute very closely and not ignore it!

South Carolina Code Ann. §63-5-30 (Rights and duties of parents regarding minor children – Parent Equality Act).

³⁵₁₇ Comment: (this statute) has always been useful in dealing with schools, doctors, or other organizations that refuse to share the child or children's information with the non-custodial parent. It is always helpful to be able to pick up a book off the shelf and guarantee access to this information to the non-custodial parent.

South Carolina Code Ann. §63-5-50 (Parental immunity in cases of incorrigibility of 17 year olds).

South Carolina Code Ann. §63-15-300, et.seq. (Uniform Child Custody Jurisdiction Enforcement Act).

³⁵₁₇ Comment: the statute or statutes I think of are the UCCJA (now the UCCJEA) and the federal Parental Kidnapping Prevention Act, which has less to do with kidnapping and more to do with jurisdictional law implemented through the Full Faith and Credit clause. Having lectured in that area several times, I continue to be amazed at how little most lawyers, including family law practitioners, know about the law in this area. I recently had a seasoned practitioner express offense at the suggestion of “kidnapping” when I cited the PKPA in a family court contesting jurisdiction in a custody case.

South Carolina Code Ann. §63-15-30 (child’s preference).

³⁵₁₇ Comment: since I do a good deal of custody work, this statute which requires a judge to consider the preference of the child has made a major difference in custody litigation. The judge is more likely to have an *in camera* hearing with the child and also allow evidence on the child’s preference.

³⁵₁₇ Comment: the statute that says the wishes of a child of any age will be considered. That has helped me a great deal as the GAL.

South Carolina Code Ann. §63-15-346 (previously §20-7-800, requiring a UCCJEA affidavit in every case affecting child custody).

³⁵₁₇ Comment: I find a lot of advantages to preparing a thorough UCCJEA affidavit. First, I sometimes uncover facts that I would not have discovered otherwise, such as prior litigation, prior custodians, frequent moves, or other persons who may claim custody. Second, some clients appreciate the thoroughness while others do not notice. Third, some judges realize they are dealing with a lawyer who knows and understands the rules while other judges do not notice. Fourth, a few judges have denied relief to an adverse party because they **did not** have a UCCJEA affidavit. Mark Twain said, “Always do what is right. It will gratify some folks and astound others.”

South Carolina Code Ann. §63-17-20 (Jurisdiction – paternity).

³⁵₁₇ Comment: I have always found this statute helpful to show many clients that the custody of an illegitimate child is with the mother.

Appellate decisions

Butler v. Butler, S.C.Ct.App., Opinion No. 4577, filed August 19, 2009.

³⁵₁₇ Comment: The Supreme Court ignored statutes and case law and ruled paying a child's graduate school expenses (here medical school) is a legitimate expense for a recipient of alimony to claim. Further, despite the recipient's increase in value of the assets she received in the divorce, the court refused to see these assets as having income earning potential or that they are assets that are available to the ex-wife to pay her expenses. The court contradicted itself when in the past, it has no problem making a payor invade his assets received in equitable distribution to support an ex-wife, yet, here where the ex-wife could support herself, the only standard was whether the ex-husband could still afford to pay her. This ruling is wrong and will create havoc for lawyers advising our clients and judge's issuing alimony orders. In addition, the ex-husband should not have suffered from the ex-wife's family problems where her brother, acting as her parents' executor, did not properly pay her the inheritance she was due. If I represent husbands, I recommend lump sum alimony because our appellate courts seem to think that a payor ex-spouse is responsible for supporting the recipient for the rest of their lives, which in essence means the payor can never retire.

Carpenter v. Burr, 381 S.C. 494, 673 S.E.2d 818 (Ct.App.2009).

³⁵₁₇ Comment: this was a trend-setting transmutation case.

Crawford v. Crawford, 301 S.C. 476, 392 S.E.2d 675 (Ct.App.1990).

³⁵₁₇ A central issue in this case is the effects of a prior settlement agreement and reconciliation agreement on the division of a marital estate.

Doe v. Doe, 370 S.C. 206, 634 S.E.2d 51 (Ct.App.2006).

³⁵₁₇ Comment: this case (from a few years ago where the wife had been cheating on the husband the entire marriage and their adult child he reared turned out not to be his). I believe it has also had a significant impact on how we look at property division and fees, and it has reduced the impact that fault has on those two issues.

Fields v. Fields, 342 S.C. 182, 536 S.E.2d 684 (Ct.App.2000).

³⁵₁₇ A central issue in this case addresses the equitable distribution and valuation of the marital estate.

Floyd v. Morgan, S.C.Sup.Ct., Opinion No. 26681, filed July 6, 2009.

³⁵₁₇ Comment: (the *Floyd* case) will certainly have a tremendous impact on the way we advise clients when dealing with child support and alimony issues in agreements.

³⁵₁₇ Comment: (the *Floyd* case) comes to mind as influencing my advice to clients both in contested cases and the negotiations of an agreement.

³⁵₁₇ Comment: *Floyd v. Morgan* is the case I would say most impacted a change and worry for me. As you are probably aware, I have advised clients that since work related daycare is a statutorily required consideration in setting child support, that the elimination of that expense would be considered by the court in recalculating child support at some later time. Well, now that I have found out that I have advised poorly, I am doing my best to craft all agreements since then with language that will help the paying client.

³⁵₁₇ Comment: I have added a long section to my agreements to avoid the obvious problems created by this decision.

³⁵₁₇ Comment: The Supreme Court's ruling ignores past case law regarding what constitutes a significant change of circumstances. Now, attorneys will have to include all possible circumstances that might occur in the future to define a significant change or specifically note in the agreement what situations do not constitute a significant change of circumstance. No guidance was provided for Family Court judges. Therefore, unless the Supreme Court reverses itself, the only solution is to change the law through the Legislature. (The Supreme Court should have followed Judge Short's dissent from the Court of Appeals.)

³⁵₁₇ Comment: While listing the significant cases, it is hard to overlook the dumbest decision I ever read in the family law area, *Floyd v. Morgan*.

Gainey v. Gainey, 382 S.C. 414, 675 S.E.2d 792 (Ct.App.2009).

³⁵₁₇ Party is not entitled to relief not requested in the pleadings.

Hardee v. Hardee, 355 S.C. 382, 585 S.E.2d 501 (2003).

³⁵₁₇ Comment: this case changed the way I prepare prenuptial agreements. Until the *Hardee* case I did not think one could waive alimony in a prenuptial agreement and tried to get around such by wording prenuptial agreements where one spouse paid the other a certain amount of money for each year of the marriage in lieu of alimony.

Johnson v. Johnson, 296 S.C. 289, 372 S.E.2d 107 (Ct.App.1988).

³⁵₁₇ The central issues in this case were an award of rehabilitative vs. permanent alimony, equitable distribution and attorney's fees.

Latimer v. Farmer, 360 S.C. 375, 602 S.E.2d 32 (2004).

³⁵₁₇ Comment: as you are aware, this is the relocation case reviewed by the South Carolina Supreme Court. I had the privilege of arguing before the Supreme Court as the Guardian in the case, and I have encountered several relocation issues/cases in my practice. I quote the *factors* in Latimer as a guide in advising clients.

Lovett v. Lovett, 329 S.C. 426, 494 S.E.2d 823 (Ct.App.1997).

³⁵₁₇ The case involves the impact of how the award of Social Security disability benefits to a spouse affects the issue of child support.

McAlister v. Patterson, 278 S.C. 481, 299 S.E.2d 322 (1982).

³⁵₁₇ Comment: it has since been "watered down" to near nothing.

McLaughlin v. McLaughlin, 244 S.C. 265, 136 S.E.2d 537 (1964).

³⁵₁₇ This case addresses child custody "factors" for consideration, and equitable distribution.

Moore v. Moore, 300 S.C. 75, 386 S.E.2d 456 (198).

³⁵₁₇ Comment: (from a family court judge – "Moore v. Moore is my answer to you!).

Morehouse v. Morehouse, 317 S.C. 222, 452 S.E.2d 632 (1994).

³⁵₁₇ Comment: I consider (the *Morehouse*) the most significant child custody opinion of the 1990's, and possibly the major landmark custody decision issued during my twenty-eight year tenure at the Bar. Significantly, *Morehouse* was authored by our late dear friend Carol Connor, herself a divorced single mom for much of her service on the Family Court bench. The opinion serves, in my humble opinion, as admonition to the bench and bar alike to avoid the routinized, "traditional" way of resolving child custody disputes. Instead, judges are urged through *Morehouse* to focus more keenly upon the psychological aspects of each set of parents and their children who come before the court for custody adjudication. Judges are to ascertain who of the parents (or contestants) is more likely to nurture and inculcate the child with respect and love for the other parent and for other people generally. Since its issuance in December, 1994, I have consistently included a discussion of the *Morehouse* holding in my initial conferences with all potential clients who claim to seek custody, and advise them on the immediate suffering and permanent damage caused by angry, vengeful parents.

Morris v. Morris, 335 S.C. 525, 517 S.E.2d 720 (Ct.App.1999).

³⁵₁₇ This case addressed a number of marital issues related to equitable apportionment and alimony.

Moseley v. Mosier, 279 S.C. 348, 306 S.E.2d 624 (1983).

³⁵₁₇ This case addresses the binding nature of an agreement reached by the parties where they have expressly precluded the family court from making subsequent modifications to the agreement without the express mutual consent of the parties.

Patel v. Patel, 359 S.C. 515, 599 S.E.2d 114 (2004).

³⁵₁₇ Patel-I addressed the role, requirements and responsibilities of the GAL in child custody litigation, and created the impetus for the ultimate passage of the Private Guardian ad Litem Act.

³⁵₁₇ Patel-II resolved a long-standing custody fight between these parents.

Peterson v. Smith, 307 S.C. 418, 415 S.E.2d 431 (Ct.App.1992).

³⁵₁₇ This case addresses continuing a child support obligation for a disabled adult-child.

Riggs v. Riggs, 353 S.C. 230, 578 S.E.2d 3 (2003).

³⁵₁₇ This case addresses continuing a child support obligation for a special needs adult-child.

South Carolina Department of Social Services v. Lisa C., 380 S.C. 406, 669 S.E.2d 647 (Ct.App.2008).

³⁵₁₇ Comment: prior to this (case), I was desperate about getting a ruling for getting out-of-court hearsay allowed for a minor child under 12. Now I am able to put a child up long enough to be “available” and even if they won’t talk about the abuse, I can get their statement in through someone else. I only intend to use hearsay now for really young children or for severe abuse/sex abuse cases.

Stradford v. Wilson, 378 S.C. 300, 662 S.E.2d 491 (Ct.App.2008).

³⁵₁₇ Comment: this is the case that sets out the factors for the court to consider before deciding what surname a child will be given in an “illegitimate child” case.

Upchurch v. Upchurch, 367 S.C. 16, 624 S.E.2d 643 (2006).

³⁵₁₇ Comment: *Upchurch* for a lot reasons: 1) make sure orders get drafted and filed promptly; 2) make sure there is something filed with the court for approval of agreements on child support indicating how child support was set so that one knows what the circumstances are; 3) have pro se litigants fill out financial declarations before your client executes an agreement.

Watson v. Watson, 319 S.C. 92, 460 S.E.2d 394 (1995).

³⁵₁₇ Comment: I have twice been “bitten” by clients who have gone against my STRONG and ONGOING advice that they must not be under the same roof once the spouse is served for a temporary hearing until the date of the temporary hearing. This is the *Watson* case, I believe, and the separation allegations do not involve fault. I just terminated a client for going back home and having sex the night before the hearing. The defendant’s affidavit blew my case out of the water and left me with very little to argue. My staff had worked really hard to coordinate the date of service to accommodate our client.

Family Court Rules

Rule 20, SCRFC (Financial Declarations)

³⁵₁₇ Comment: Court Administration mandated a new financial declaration on January 1, 2009, which is inferior to the previous version, in my humble opinion, because it omits the attachment of a marital assets addendum. I now must advise my client to be much more thorough in (his or her) preparation of a marital assets addendum, and be sure to include everything they believe is in the adverse party's possession, because I can never insure that opposing counsel (or an adverse party) will prepare one. While many attorneys fail to consider "pots and pans" important, or not worth the time, I disagree and think that is a significant tactical mistake.

Rule 21, SCRFC (Temporary hearings)

³⁵₁₇ Comment: there are many, but I would choose Rule 21, Family Court Rules. Temporary hearings are so very crucial to the case many times in that they are very much needed, hard to get scheduled as quickly as we would like, and when they are held and the temporary decision is made, the posture of the case and the dynamics involved are for the most part set and can actually influence the ultimate outcome of the case.

Miscellaneous

ADR Rules affecting mediation in family court.

³⁵₁₇ Comment: an obvious response is that mediation has changed the practice and advice. I now advise clients to engage in mediation from the outset, as soon as discovery is at a stage (where) mediation could work.

³⁵₁₇ Comment: another thing that has changed the way I practice family law was the advent of mediation which initially a lot of family law practitioners vehemently opposed, but which proved to be highly beneficial.

South Carolina Child Support Guidelines.

³⁵₁₇ Comment: The child support guidelines – Schedule C. If the mother agrees to more than 109 overnight visits, then the judge could use Schedule C which results in a substantially reduced child support figure.

Rule 5(b)(3), SCRCP.

³⁵₁₇ Comment: I now have my administrative assistant call the lawyer who didn't prepare a proposed order (the opposing attorney) to ask if there are any objections as to form or content (this doesn't apply to a form or routine proposed order). This has prevented a lot of complaints, especially (from the opposing attorney) about not having seen the order prior to its submission (in spite of the requirement of the Rule).

Rule 16(c), SCRCP, requiring a pretrial brief.

³⁵₁₇ Comment: Rule 16(c) has changed slightly since I wrote the article (for *South Carolina Lawyer*). It is significant because it taught me an important lesson in preparing cases for trial. I try to prepare a pretrial brief for my own benefit in every case, regardless of whether the court requires it or whether I even serve or file it. I find that if I start a pretrial brief when I open the file, it is a great place to store facts, questions, research, settlement negotiations, and the like.

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