

1979 S.C. Op. Atty. Gen. 52 (S.C.A.G.), 1979 S.C. Op. Atty. Gen. No. 79-37, 1979 WL 29043

Office of the Attorney General

State of South Carolina

Opinion No. 79-37

March 1, 1979

**\*1 Subject: Support, Uniform Reciprocal Enforcement of Support Act**

Testimony by husband or wife as to access or non-access with the marriage partner is admissible in a proceeding under the uniform Reciprocal Enforcement of Support Act.

TO: David H. Maring  
Chief Judge  
Family Court of the Fifteenth Judicial Circuit

Question:

Is a person's testimony concerning access and non-access to a marriage partner admissible in a proceeding under the Uniform Reciprocal Enforcement of Support Act?

Statutes and Cases

§ 20–7–340 of the 1976 Code of Laws for South Carolina [Barr's Next of Kin vs. Cherokee, Inc.](#), 220 S.C. 447, 68 S.E.2d 440 (1951).

[People's National Bank of Greenville v. Manos Brothers](#), 226 S.C. 257, 64 S.E.2d 857 (1954).

Other Materials Cited

15 Corpus Juris Secundum, 'Common Law' § 13

Discussion

The present state of the Common Law in South Carolina forbids the introduction of testimony by a person involved in a paternity suit where such testimony concerns non-access by the witness to a spouse during the period of conception of the child in question. Where the question of the paternity of a child born in wedlock arises, the law presumes that the child, if born after a lawful marriage and the lapse of the usual period of gestation, is legitimate. Such presumption, though rebuttable, is one of the strongest presumptions known to the law. Neither the mother nor her husband may testify as to the access or non-access between them. Proof must come from a third party by the clearest of evidence that it was impossible for the husband, by reason of impotency, imbecility, or entire absence from the mother's presence during the critical period, to have had access to her. [Barr's Next of Kin v. Cherokee, Inc.](#), 220 S.C. 447, 68 S.E.2d 440 (1951), [People's National Bank of Greenville vs. Manos Brothers](#), 226 S.C. 257, 84 S.E.2d 857 (1954).

The case law cited above would prevent the admission of such testimony in cases filed under the Uniform Reciprocal Enforcement of Support Act (URESA) unless a statutory or constitutional exception can be found. 15(a) C.J.S., 'Common Law' § 13. § 20–7–340, [South Carolina Code of Laws](#) (1976) states:

'Laws attaching a privilege against the disclosure of communications between husband and wife are inapplicable to proceedings under this article. Husband and wife are competent witnesses to testify to any relevant matter (emphasis added), including marriage and parentage.'

This language indicates a clear intent on the part of the General Assembly to allow the judge access to all pertinent facts involved in a URESA proceeding. The type of testimony prohibited under Common Law was excluded, not for the purpose of relevancy, but was intended to prevent family dissension and was based on ' . . . highest grounds of public policy, decency, and morality'. Barr's Next of Kin v. Cherokee, Inc., Supra. Never having been considered irrelevant, it would follow that 'non-access' testimony would fall under the blanket grant of competency found in the above statute relating 'any relevant matter'.

\*2 Another significant point in support of the argument for admissibility is the fact that both the statute and the Barr case refer to competency. The Barr case states:

' . . . Nor are the declarations of such husband and wife competent as bearing on the question.'

The statute, which was enacted subsequent to the Barr case, grants competency to a husband and wife to testify as to any relevant matter. The use of the same terms by the General Assembly that were used by the Supreme Court could only indicate that an intent on the part of the Legislature to set guidelines with respect to this type of testimony was present.

#### Conclusion

§ 20-7-340 creates an exception to the general rule of non-admissibility of 'non-access' testimony which was formulated in the Barr case. Such exception is strictly limited to URESA proceedings and will not affect paternity cases brought under the Family Court Act. Neither will admission of such testimony lessen the weight of the presumption of legitimacy or remove the Respondent's burden of rebutting the presumption by 'the clearest evidence'. This opinion is limited to cases where the children were conceived in wedlock and should not be construed as to alter previous opinions of this office to the effect that paternity cannot be litigated under URESA.

Clifford O. Koon, Jr.  
Assistant Attorney General

1979 S.C. Op. Atty. Gen. 52 (S.C.A.G.), 1979 S.C. Op. Atty. Gen. No. 79-37, 1979 WL 29043