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Office of the Attorney General

State of South Carolina
Opinion No. 79-57
March 26, 1979

***1 SUBJECT: Alimony; Discrimination; Marriage and Divorce.**

(1) The present provisions dealing with the payment of alimony are violative of the 14th Amendment of the United States Constitution.

(2) A final decree awarding alimony may not be collaterally attacked on the basis that the decree was made pursuant to a statute which is subsequently determined to be unconstitutional.

TO: The Honorable Rex L. Carter
Speaker of the House
The Honorable Raymon Schwartz, Jr.,
Speaker Pro Tempore

QUESTIONS:

1. Are the present provisions dealing with the payment of alimony violative of the 14th Amendment of the United States Constitution?

2. Can a final decree awarding alimony be collaterally attacked on the basis that the decree was made pursuant to a statute which is subsequently determined to be unconstitutional?

STATUTES AND CASES:

United States Constitution, Amendment 14; Code of Laws of South Carolina, § 20–3–120, § 20–3–130, § 20–3–150, § 20–3–170 et al.; Orr v. Orr, 47 U.S.L.W. 4224 (March 5, 1979); Railroad Commn. v. Pullman, 312 U.S. 496 (1941); Board of Regents v. Bakke, ___ U.S. ___, 57 L.Ed.2d 750 (1978); Chicot County Drainage Dist. v. Baxter State Bank, 308 U.S. 371 (1939); Stovall v. Denno, 388 U.S. 293 (1967); Darden v. Witham, 263 S.C. 183, 209 S.E.2d 42; State v. Nathans, 49 S.C. 199, 275 S.E. 52; Jennings v. Jennings, 104 S.C. 242, 88 S.E. 527; State v. Highsmith, 105 S.C. 505, 90 S.E. 154; Ex Parte Hollman, 79 S.C. 9; Ex Parte Klugh, 132 S.C. 199, 128 S.E. 882; Atkinson v. Express Co., 94 S.C. 444; Wofford and Converse Colleges v. Burnett, 209 S.C. 92, 39 S.E.2d 155; Herndon v. Moore, 18 S.C. 339; Davenport v. Caldwell, 105 S.C. 317; Piana v. Piana, 239 S.C. 367, 123 S.E.2d 297; State ex rel. McLeod v. Probate Court of Colleton County, 266 S.C. 279, 223 S.E.2d 166; Ex Parte Florence School, 43 S.C. 11; Hughes v. Hughes, 362 So.2d 910 (Ala.App.), Cert. dismissed as improvidently granted, 362 So.2d 918 (Ala., 1978); State v. Wear, 145 Mo. 162, 46 S.W. 1099; Anno. 66 A.L.R.2d 880; Anno. 167 A.L.R. 517; Anno. 12 A.L.R.2d 1059; 24 Am. Jur.2d, Divorce and Separation, §§ 659, 662, 676, 677, 762; 46 Am.Jur.2d, Judgments, §§ 19, 399, 641, 642; Tribe, American Constitutional Law, pp. 24–26.

DISCUSSION:

Thank you very much for your letter of March 7, 1979. You have requested an opinion from this Office, regarding the potential impact of the recent United States Supreme Court decision, Orr v. Orr, 47 U.S.L.W. 4224 (March 5, 1979) upon the laws of this State concerning alimony, particularly upon 'existing decrees.'

In Orr, v. Orr, supra, the Court held that for a state to employ gender as a criteria in the award of alimony pursuant to a divorce decree was, at least in the circumstances before the Court, constitutionally impermissible. The Court, after considering such jurisdictional issues as petitioner's standing, concluded that Alabama's statutory scheme for awarding alimony, which offered no possibility for husbands to receive an award, violated the Equal Protection Clause. Alabama's justifications for imposing such unequal burdens, e.g. that gender served as a useful indication of financial need, were rejected, because such justifications were not 'substantially related' to 'important governmental objections.' Supra, p. 4227.

***2** In light of Orr, it is my conclusion that this state's statutes concerning the award of alimony, Code of Laws of South Carolina, § 20–3–120, § 20–3–130, § 20–3–150, § 20–3–170 (1976) are constitutionally infirm. [1] Just as in Orr, South Carolina's statutory scheme places a burden upon men which is not similarly imposed upon women; likewise, the statutes distribute benefits to women which men do not enjoy. For example, § 20–3–130 mandates that:

In every judgment of divorce . . . in a suit by the wife the court shall make such orders touching the maintenance, alimony and suit money of the wife or any allowance to be made to her . . . But no alimony shall be granted to an adulterous wife . . . (emphasis added).

Also, § 20–3–170 states in part:

Whenever any husband, pursuant to judgment of divorce, . . . has been required to make his wife any periodic payments of alimony and the circumstances of the parties or the financial ability of the husband shall have been changed since the rendition of the judgment, either party may apply to the court . . . for an order and judgment decreasing or increasing the amount of such alimony payments or terminating such payments . . . (emphasis added).

Nowhere within the statutory scheme is there any provision from which it might be reasonably inferred that husbands could be awarded alimony. Likewise, there is no provision therein which either expressly or implicitly might require wives to pay alimony. Further, it is a well-established general rule that a husband may not be awarded permanent alimony against his wife in the absence of statutory authority. See: Anno., 66 A.L.R.2d 880. No South Carolina cases have been discovered which abrogate the well recognized common law that husbands were not entitled to alimony. Thus, there seems little likelihood that if the present statutory scheme was constitutionally challenged, a Court might avoid the constitutional question by an alternate interpretation of the statute. Cf. Railroad Commn. v. Pullman, 312 U.S. 496 (1941). See also: Darden v. Witham, 263 S.C. 183, 193, 209 S.E.2d 42, 46.

Accordingly, I would recommend that the General Assembly amend the statutes to make them 'gender-neutral' as mandated by Orr. Seemingly, this would require a statutory assurance that husbands are potentially entitled to the same alimony benefits as wives, and that wives potentially bear the same burdens as husbands. Gender should not be a factor in the award of alimony. [2] The proposed bill, H–2634, presently pending, accomplishes this, and would seemingly moot any prospective constitutional attack upon the statutes.

The problem of collateral constitutional attack, such as in contempt proceedings, upon those divorce and alimony decrees, existing prior to Orr is somewhat more difficult. However, Orr makes it clear, supra, p. 4226, n. 4 that, as a matter of federal law, the decision was not designed to alter retroactively, existing decrees. The Court there observed:

***3** This does not preclude any other state or even Alabama in another case from holding that contempt proceedings are too late in the process to challenge the constitutionality of a divorce decree already entered without constitutional objection . . . Indeed, . . . Alabama has a similar rule. See Hughes v. Hughes, 362 So.2d 910 (Ala.App.) Cert. dismissed as improvidently

granted, 362 So.2d 918 (Ala., 1978) . . . There is therefore, no reason for concern that today's decision might nullify existing alimony obligations . . . (emphasis added).

Thus, Orr characterizes as a distinctly state law question whether a person may collaterally attack on constitutional grounds an existing alimony decree entered against him.[3] The issue is whether South Carolina law allows a constitutional defense to be raised for the first time in collateral proceedings in order to alter or abrogate an already adjudicated decree. While the question is not free from doubt, and is in reality a decision for the courts, it is my conclusion that such a collateral attack, either in contempt or modification proceedings is 'too late in the process.' Orr, supra.

First, it is clear that the general principle of res judicata[4] is equally applicable to a divorce and alimony decree in that the judgment is final.
The principle that an adjudication by a court having jurisdiction of the subject matter and the parties is final and conclusive not only to the matters actually determined, but as to every other matter which the parties might have litigated . . . even though not formally put in issue therein, applies to divorce actions as well as to other kinds of actions . . .

24 Am. Jur.2d, Divorce and Separation, § 662, pp. 778–779. See also: § 659, pp. 776–778. Also,
A decree granting permanent alimony payable periodically is a final judgment to which the doctrine of res judicata applies, and although the statutes authorize a modification of the decree, the petitioner . . . must, to avoid the res judicata effect of the decree, show . . . a substantial change in the material circumstances . . ..

Supra, § 676, pp. 794–795. It is further apparent that modification, due to a change in 'the circumstances of the parties or the financial ability of the husband' authorized by § 20–3–170, may not be based upon the merits of the decree itself, supra, § 677 et. seq. The parties may not relitigate the substantive legal issues or raise new ones at a proceeding of this kind, and may only make a factual showing of change of circumstances for modification of the decree. The only exception would be rendition of a void judgment, e.g. for lack of jurisdiction.

As to contempt proceedings, collateral in nature, the same general principles are applicable. The unconstitutionality of a statute is normally not a ground for a collateral attack upon a judgment, which was based upon the statute. See: Anno. 167 A.L.R. 517, 540; Anno., 12 A.L.R.2d 1059, 1079. However, there is authority otherwise, the conflict being best described as follows:
***4** The view has been taken in some cases . . . that a judgment . . . [based upon an unconstitutional statute] is without jurisdiction and void and attackable collaterally by resistance to its enforcement . . . However, the rule recognized in a number of cases is to the effect that a judgment on the merits based on an unconstitutional statute is not void, but merely voidable . . . Accordingly, the rule followed is that the unconstitutionality of a statute is not a ground for a collateral attack . . .

46 Am. Jur.2d, Judgments, § 642, p. 801. See also: § 641, p. 797, § 19, pp. 325–326; Tribe, American Constitutional Law, pp. 24–26; Chicot County Drainage Dist v. Baxter State Bank, 308 U.S. 371 (1939).

In South Carolina, the case law might be construed as somewhat ambiguous. In State v. Nathans, 49 S.C. 199, 27 S.E. 52, the court suggested adherence to the majority rule [no collateral attack] by observing:
The disobedience of any order, judgment or decree of a court having jurisdiction to issue it, is a contempt of that court, however erroneous or improvident the issuing of it may have been. Such order is obligatory until reversed by an appellate court, or until corrected or discharged by the court which made it . . . (emphasis added).

The principle was reiterated in Jennings v. Jennings, 104 S.C. 242, 88 S.E. 527, an appeal from contempt proceedings. There, the Court observed that 'even if the injunction should be reversed or set aside on appeal, the contempt would not fall with it, unless

the judgment was void for want of jurisdiction . . . (emphasis added). The Court further noted no absence of jurisdiction, even though the constitutionality of the statute itself had been raised. See also: State v. Highsmith, 105 S.C. 505, 509, 90 S.E. 154.

On the other hand, other South Carolina decisions have taken the position that where a statute upon which a judgment was based was unconstitutional, the statute was void ab initio, thereby rendering the judgment itself a nullity, and thus subject to collateral attack. See: Ex Parte Hollman, 79 S.C. 9, where the Court distinguished 'mere errors of law' from an unconstitutional statute, 'in reality no law'. However, this case involved a habeas corpus attack upon a criminal conviction, clearly distinguishable from civil contempt proceedings. See: Anno., 12 A.L.R.2d 512, 522. Compare p. 532 et seq. See also: Ex Parte Klugh, 132 S.C. 199, 128 S.E. 882 (habeas); Atkinson v. Express Co., 94 S.C. 444, 453.

In Wofford and Converse Colleges v. Burnett, 209 S.C. 92, 39 S.E.2d 155, the Court reiterated this general principle that an unconstitutional statute was void, distinguising Chicot Co., Drainage Dist. v. Baxter State Bank, supra, on the basis that in Chicot, the constitutional issue had not been previously raised in an 'earlier adjudication by a lower federal court.' Supra, p. 100. In Wofford, there were no earlier judgments in need of preservation; thus, the Court did not feel constrained to depart from 'the general rule that an adjudication of unconstitutionality of a statute reaches back to the date of the act itself.' Supra, p. 102.

***5** On the other hand, however, the Court also clearly seemed to approve the principle that no collateral attack on constitutional grounds upon the statute should be permitted. The Court referred approvingly to Herndon v. Moore, 18 S.C. 339, which had earlier preserved hundreds of pre-existing partition decrees, where the constitutionality of such decrees had never been directly questioned, until the later decision of Davenport v. Caldwell, 10 S.C. 317. In Herndon, the Court observed with respect to Devenport:

. . . I am satisfied that the decision there made cannot have any retroactive effect-cannot undo what has been done without question in a vast number of cases in the Probate Court generally throughout the State . . . Rights vesting under such circumstances cannot be disturbed by subsequent decisions of a contrary effect . . .

The Court in Wofford expressly approved this principle, distinguishing the case on its facts, because in Wofford no preexisting judgments would be affected.

Finally, in Piana v. Piana, 239 S.C. 367, 123 S.E.2d 297, the Court refused to allow a collateral attack upon a judgment, except where the judgment was void, due to a want of jurisdiction. Quoting with approval from State v. Wear, 145 Mo. 162, 205, 46 S.W. 1099, 1112, the Court distinguished between complete absence of jurisdiction and mere error in the exercise of jurisdiction. The pendency of a cause in a court where jurisdiction exists, facts, because in Wofford no preexisting in a lawful manner, is a test of the continuance of such jurisdiction, and of its valid exercise until final disposition . . . no matter how flagrant may be the errors, which attend the exercise of such jurisdiction . . . The jurisdiction to decide right being once conceded, such concession necessarily embraces the power to decide wrong, and a wrong decision, though voidable . . . cannot be attacked collaterally. The only way its binding force can be escaped or avoided is by appeal or writ of error. (emphasis added).

Supra, pp. 371–2. While the question of constitutionality itself was not before the Court, it seems clear that Piana adopted the majority rule, which as heretofore noted, distinguishes between a genuine lack of jurisdiction and errors of law in the exercise of that jurisdiction. As noted earlier, the question of constitutionality is considered as included within the latter category by the majority rule. Thus, constitutional collateral attacks are precluded. 46 Am. Jur.2d, Judgments, § 19. See also: 24 Am. Jur.2d, Divorce and Separation, § 762, pp. 868–9. See also: State ex rel. McLeod v. Court of Probate of Colleton County 266 S.C. 279, 300–302, 223 S.E.2d 166; Ex Parte Florence School, 43 S.C. 11, 16.

Therefore, while there is language in several South Carolina cases which might be construed to allow a collateral attack on constitutional grounds upon a preexisting alimony decree, where the issue had not been raised [5] it is my opinion that this is not the law in this state. Based upon the South Carolina authorities cited, which clearly indicate that South Carolina follows the

majority rule, and upon general principles governing the retroactive application of a constitutional decision, [6] I would conclude that Orr v. Orr would only be given prospective application by the Courts in South Carolina. Therefore, existing alimony decrees are not subject to collateral attack.

ADDENDUM:

***6** Additionally, you have asked the question what the 'Legislature might do to assist in not having . . . [a] great disruption of existing decrees'? I take this to mean whether, assuming that the General Assembly included within the proposed legislation a provision which stated that, in essence, all preexisting alimony decrees were final, and not subject to collateral attack, such a provision would be valid.

It is, of course, well recognized that:
The general rule is that the legislature may not destroy, annual, set aside, vacate, reverse, modify or impair the final judgment of a court of competent jurisdiction.

46 A. Jur.2d, Judgments, p. 318. Here, however, the proposed legislation would not attempt to 'vacate' or 'modify' existing decrees, but would reinforce them. The legislation would merely codify the common law principles stated above. I have been able to find no case which would absolutely preclude such an approach.

However, I would caution that such a provision might be open to constitutional attack, especially on the grounds that the statute violates the separation of powers provision of the State Constitution. See: Constitution of South Carolina, Art. 1, § 8. See, e.g. Segars v. Parrott, 54 S.C. 1, 31 S.E. 677; Ex Parte Tillman, 84 S.C. 522, 66 S.E. 1049. The General Assembly might clearly declare the common law in this matter, and in reality has done so, by classifying an alimony decree as a 'judgment' in § 20–3–170. Nevertheless, when aimed at a particular class of judgments, such as existing alimony decrees, the legislation takes on the appearance of a judicial function. Thus, I do not recommend any legislation in this regard and believe the matter best resolved by the Courts of this State.

CONCLUSIONS:

1. The present provisions dealing with the payment of alimony are violative of the 14th Amendment of the United States Constitution.

2. Under the existing case law, a final decree awarding alimony may not be collaterally attacked on the basis that the decree was made pursuant to a statute which is subsequently determined to be unconstitutional.

3. It is not recommended by this Office that the General Assembly enact legislation dealing with preexisting alimony decrees, a matter which would best be resolved by the Court of this State.

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Attorney General

Footnotes

1 A logical extension of Orr would seem to dictate the same result for other domestic relations matters, e.g. the award of support.

2 Orr hints that if the State can make a strong case that women, as a result of past discrimination, require additional compensation in order to ameliorate such discrimination, a gender-based alimony statute might be upheld. Supra, p. 4227. However, Orr itself counsels against such 'benign' discrimination, and in light of Board of Regents v. Bakke, ___ U.S. ___, 57 L.Ed.2d 750, such an approach would undoubtedly generate further constitutional attack.

3 The same can be said for those alimony decrees existing by court approved agreement or property settlement. Orr, supra, p. 4226, n. 5. Such agreements would, for many of the same reasons as follow, be precluded by collateral attack.

4 While the doctrine of res judicata and collateral attack are similar in nature, they are, of course, not identical. See: 46 Am. Jur.2d, Judgments, § 399, p. 567.

5 Being raised only following a subsequent declaration of unconstitutionality at the urging of a different party.

6 See the factors for determining retroactivity in Stovall v. Denno, 388 U.S. 293, 297 (1967), a criminal procedure case. One important criteria, 'the effect on the administration of justice of a retroactive application of the new standards' is well recognized in Herndon v. Moore, supra and State ex rel McLeod v. Probate Court of Colleton County, supra. Here, clearly a retroactive application would jeopardize thousands of preexisting judgments.

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