1977 WL 46018 (S.C.A.G.)

Office of the Attorney General

State of South Carolina
November 9, 1977

Re: Guardianship

***1** Honorable Betty Curtis
Judge of Probate
Chesterfield County Courthouse
Chesterfield, South Carolina 29709

Dear Judge Curtis:
A guardian seeking to dispose of real property of his ward must obtain court authorization. Scurry v. Edwards, 232 S.C. 53, 100 S.E.2d 812. You have asked whether the Court of Probate has the jurisdiction to authorize a sale of real estate by a guardian.

The probate courts in South Carolina are created by statute. Section 14-23-10, Code of Laws of South Carolina, 1976, as amended; § 1 of Article V of Act # 690 of 1976. Consequently, the courts derive their authority from legislative enactment together with such powers that are necessarily incident to the execution of authority expressly bestowed by statute. Greenfield v. Greenfield, 245 S.C. 604, 141 S.E.2d 920.

A perusal of the statutory law relative to probate courts reveals several statutes indicating a legislative intention to vest the probate courts with the authority to authorize the sale of real property by a guardian on behalf of his ward. Section 15 of Article V of Act # 690 of 1976 grants the probate court jurisdiction:
(b) To appoint and remove guardians of minors and committees of persons mentally incompetent, and to supervise the management and disposition by such guardians of the estates of their wards;

In addition, §§ 14-23-34C and 21-19-20 of the 1976 Code emphasize the probate court's authority to hear proceedings relative to persons under guardianship.
All proceedings in relation to the property or estate of any person under guardianship shall be had in the court of probate of the county in which the guardian was appointed. §14-23-340. (Emphasis added)

. . .

All proceedings in relation to the property or estate of any person under guardianship shall be had in the court of probate of the county in which the guardian was appointed. Such probate court by which a guardian shall be appointed shall have jurisdiction of the estate of the ward and shall be alone authorized to permit the sale of such estate and settle such guardian's accounts. §21-19-20. (Emphasis added)

Further support for the proposition that the probate court may authorize a guardian to dispose of real property of the ward is found at § 21-19-160. Said section, inter alia, prescribes application by guardian to the court for orders partitioning land in various situations.

Above quoted statutes evince legislative intent to vest the probate court with the jurisdiction to authorize the guardian of a ward to dispose of real property. Furthermore, such authority would reasonably be necessary to execute the general legislative

grant of jurisdiction bestowed on the court of probate to supervise the management and disposition of estates of persons under guardian-ship.

As such, it appears that the court of probate has the jurisdiction to authorize a guardian appointed by said court to sell real property of his ward.

***2** If I can be of further assistance please call.
Very truly yours,

Edwin E. Evans
Assistant Attorney General

ATTACHMENT

A SURVEY OF CHILD SUPPORT LAW IN SOUTH CAROLINA

I. FARLY COMMON LAW

Early legal doctrine held that a parent had no common law liability for the support of his minor, dependent children, whether legitimate or illegitimate. This view has been partially reversed by more recent judicial opinion, however, and at common law it is now held that a parent, meaning primarily the father, has a duty to support his minor, dependent, legitimate children to the extent that he is able. This duty to support his children continues even after he is divorced from their mother. Campbell v. Campbell, 200 S.C. 67, 20 S.E.2d 237 (1942). In the event that the father is not available to provide support, the duty has been placed upon the mother, if she has the means. Workman v. Workman, 174 S.C. 490, 178 S.E. 121 (1934).

The common law has not been changed regarding illegitimate children. An illegitimate child was called a “filius nullius,” the child of nobody, and there was no legal duty on the part of the father of such a child to provide support, nor was there any procedure at common law for determining paternity. McGlohon v. Harlan, 254 S.C. 207, 174 S.E.2d 753 (1970).

The husband is generally given the right of determining where the family will reside, and the wife cannot demand that he provide support for her and their children elsewhere. State v. Scurry, 114 S.C. 191, 103 S.E. 527 (1920). If, however, because of cruel and inhuman treatment by the husband, or for any other reason which the Court considers a just cause or excuse, the wife and children are unable to live peacefully in the home provided by the husband, and for this reason they leave, then the husband is guilty of constructive desertion, and he is liable for their support wherever they may go. State v. Collins, 235 S.C. 65, 110 S.E.2d 270 (1959).

II. CRIMINAL NONSUPPORT

Failure by a husband or father to support his wife or his minor, unmarried, legitimate or illegitimate children is made a criminal offense by § 25-7-40 of the 1976 S.C. CODE. Such failure is a misdemeanor, and upon conviction the husband or father may be imprisoned for a maximum of one year, or be fined not less than $300.00 nor more than $1500.00, or both. If a fine is imposed, part of the fine may be used for support and maintenance of the defendant's legitimate or illegitimate children. Prior to 1962, the prodecessor to § 25-7-40 applied only to nonsupport of a wife and legitimate children, but nonsupport of illegitimate children was also made a criminal offense by the General Assembly in 1962. At the same time § 20-305 through 20-309 of the 1962 CODE, the bastardy statutes were repealed. Illegitimate children are now given the same rights and protection as legitimate children under the criminal laws of this state. Failure to support a wife or child under § 25-7-40 is a continuing defense. State v. Stone, 111 S.C. 496, 98 S.E. 333 (1919), State v. Nesmith, 185 S.C. 341, 194 S.E. 160 (1937). The husband or father must show “just cause or excuse” for failure to support his wife or child, State v. Redmond, 150 S.C. 452, 148 S.E. 474 (1929), and it is no defense to prosecution that the wife is not dependent on her husband for support. State v. English, 101 S.C. 304, 85 S.E. 721 (1915). The defense of just cause or excuse available to the father under the criminal statute is not available to him in a civil suit for child support. State v. Hellams, 209 S.C. 141, 39 S.E.2d 212 (1946), Wolfe v. Wolfe 220 S.C. 437, 68 S.E.2d 348 (1951). The common law principles that the unfaithfulness of the wife does not excuse the father from supporting

his minor, unmarried children, State v. Stafford, 193 S.C. 474, 8 S.E.2d 849 (1940), and that a husband has no duty to support his family when his wife takes the minor children and leaves the home without just cause or excuse, State v. Hellams, supra, apply in a criminal trial for nonsupport.

III. CURRENT CIVIL NONSUPPORT LAW

A. AT COMMON LAW

***3** Civil courts in South Carolina still recognize the obligation at common law of a father to support his minor, dependent, legitimate children, and the fact that this duty continues even after divorce. McLeod v. Sandy Island Corp., 265 S.C. 1, 216 S.E.2d 746 (1975). Although conviction of adultery terminates a wife's right to support by her husband after divorce, it does not terminate the right of any children of the marriage placed in her custody to support by their father. Lee v. Lee, 237 S.C. 532, 118 S.E.2d 171 (1961). Where a wife takes the children from the home and is found guilty of desertion of her husband, her children living with her are still entitled to support from their father. Wolfe v. Wolfe, supra.

B. UNDER CHILD SUPPORT STATUTES

The South Carolina Supreme Court has recently affirmed the right of children to support under the statutes of this state. In the case of Redick v. Redick, S.C., 222 S.E.2d 758 (1976), the mother of two minor children came into Family Court in order to enforce the child support provisions in a divorce decree. The father had not actively sought gainful employment during the two preceding years, and his failure to do so was not explained. The Family Court held that it had no productive remedy to enforce the child support payments. The Supreme Court reversed the decision, stating that it is the intent of the South Carolina Legislature that any father who has the means, or who is able to earn such means, shall pay a reasonable sum for the support of his child. The Court decided as authority § 15-1095.24 (3) CODE 1962 (§ 14-21-810 (3) CODE 1976) and § 15-1095.25 CODE 1962 (§ 14-21-820 CODE 1976) of the Family Court Act, and § 20-303 CODE 1962 (§ 25-7-40 CODE 1976). These sections apply to both legitimate and illegitimate children. Often cited are sections of the Juvenile and Domestic Relations Courts Act which have since been repealed by implication. The Supreme Court went on to cite the enforcement and contempt sections of the Family Court Act and the Juvenile and Domestic Relations Court Act as the productive remedy which the lower court had stated that it lacked.

The South Carolina Family Court Act is in accord with the U.S. Supreme Court case of Gomez v. Perez, 409 U.S. 535, 35 L.ED.2d 56, 93 S. Ct. 872 (1973), which said that once a state gives a judicially enforceful right, either at common law or under its statutes, to legitimate children to be supported by their natural father, the same right must be extended to illegitimate children, since failure to do so would be invidious discrimination. The Family Court Act provides for the establishment and enforcement of the support rights of both legitimate and illegitimate children. In a later case, Linda R. S. v. Richard D., 410 U.S. 614 35 L.Ed.2d 536, 93 S. Ct. 1146 (1973), the mother of an illegitimate child attempted to challenge as unconstitutional a Texas statute which made nonsupport of legitimate children a criminal offense, but had no provisions for nonsupport of illegitimate children. The U.S. Supreme Court did not decide the issue because it said that the plaintiff had no case or controversy.

C. UNDER FOREIGN DIVORCE DECREES

***4** A foreign decree for alimony and child support may be established and enforced in the equity courts of South Carolina, which may assume jurisdiction of the decree. The court may use all equitable remedies available to it, such as citation for contempt, to enforce the foreign decree just as it would enforce its own decree, and it is not necessary that the plaintiff resort to execution on a judgement recovered locally on a foreign decree. Enforcement may be had as to past due installments as well as to future installments when they become due. Johnson v. Johnson, 194 S.C. 115, 8 S.E.2d 351 (1940). Where a final divorce decree awards alimony payable in future installments, the right such installments becomes vested when due, and is protected by the full faith and credit clause of the Constitution. Sistare v. Sistare, 218 U.S. 1, 54 L.Ed. 905, 30 S. Ct. 682 (1910). Although South Carolina Courts must give full faith and credit to the foreign decree, they need not enforce the foreign decree any more vigorously than they would enforce a domestic decree. Alimony is different from other judgments in that the defendant can be

imprisoned for contempt if he refuses to pay alimony, while he may not be imprisoned for failure to pay a debt. Thus, courts may be more lenient in the enforcement of alimony payments if the defendant has a good excuse for his failure to pay. Although the court may reduce the amount which the defendant must pay under the foreign alimony decree, be remains liable for the full amount, and the only way in which the decree can be modified is by petition to the foreign court.

Johnson v. Johnson, 196 S.C. 474, 13 S.E.2d 593 (1941), White v. White, 196 S. Supp. 588 (D.C.S.C. 1959). The plaintiff is also entitled to interest on the acrued payments. Gardner v. Gardner, 253 S.C. 296, 170 S.E.2d 372 (1969). In the Gardner case, the plaintiff asked the Family Court of Spartanburg County to enforce support payments aranted under a valid Nevada divorce decree. The plaintiff had previously obtained a U.R.E.S.A. order against the defendant in a California court under the Nevada decree. The South Carolina court said that the U.R.E.S.A. order from the California court for the payment of a lesser amount than the original decree had not modified the original decree, but that the defendant would be given credit for amounts paid under the U.R.E.S.A. decree.

IV. CHILD SUPPORT LITIGATION

A. DEFENSES

There are three possible defenses which may be raised in a suit for child support. The first defense is proof that the defendant is not the father of the child. Paternity suits will be discussed below. The second defense is the common law defense discussed above, that is, that if the mother takes the children without just cause or excuse from the home which her husband has provided for them, then she cannot have him criminally prosecuted. A third possible defense to liability for child support is a change of circumstances such that the father no longer has the means to contribute to the support of his children. This defense, which will be discussed below, merely suspends the father's duty until his circumstances improve.

B. VENUE

***5** Venue in civil cases is determined under § 15-7-30 CODE (1976). Venue in a criminal action for desertion or failure to provide for a wife or children is proper in the county where the omission occurs. State v. Nesmith, supra. A husband is required to support his wife and children only in the home he provides, so if the husband and wife live apart, venue is proper in the county in which the husband has established the home. State v. Peoples, 112 S.C. 310, 99 S.E. 813 (1919). If the husband is guilty of constructive desertion, however, he must support his family wherever they may be, and in that situation, venue is proper in the county where the wife and children reside. State v. Stone, supra.

C. JURISDICTION OVER AN ABSENT PARENT

A judgment affecting the personal rights of a party to the litigation may be rendered only by a Court having in personam jurisdiction over the party. A divorce proceeding is an in rem action in which jurisdiction may be obtained over an absent party by constructive service, but decrees for the payment of alimony and child support affect personal rights, and in order for such decrees to be valid, the court rendering them must have actual jurisdiction over the person or property against whom the decree is made. Carnie v. Carnie, 252 S.C. 471, 167 S.E.2d 297 (1969). If the court has obtained personal jurisdiction over a party in the initial action in a divorce proceeding, such jurisdiction continues in supplemental proceedings. In the case of Everhart v. Everhart, 261 S.C. 322, 200 S.E.2d 87 (1973), the divorced wife was attempting to collect past due alimony and child support granted in a valid divorce rendered in South Carolina. In the divorce action, the husband, a Georgia resident at all times, had submitted to the jurisdiction of the court, but he appeared specially to contest jurisdiction in the subsequent enforcement proceeding. The Supreme Court stated that an action to enforce a support order is supplemental to the original suit, and the trial court has continuous jurisdiction. It went on to say that where a court of equity has assumed jurisdiction of a cause, it retains such jurisdiction to dispose of all issues within the scope of the pleadings, including the enforcement of its judgments. Such jurisdiction is retained by the court even though it may not specifically say so in its decree. In Everhart, the husband personally served with notice of the enforcement action, although service by mail has been held to be sufficient. Prensky v.

Prensky, 146 So.2d 604 (FLA APP. 1962). The court in Everhart also stated that although the wife could have brought her action under U.R.E.S.A., that it was not her exclusive remedy. Section 20-7-150 CODE (1976).

The Family Court Act, § 14-21-830 CODE (1976), provides for jurisdiction over a parent who is either a resident of the county in which the court has jurisdiction, or who is found within that county, provided the petitioner is also residing in or domiciled in that county at the same time. The same section further provides for jurisdiction over a parent who is neither residing nor domiciled nor found in the county in which the court has jurisdiction, but who, while he was residing or domiciled in such county, fail to furnish support for his wife or child. Jurisdiction is also granted over an absent parent who, while residing or domiciled in the county in which the court has jurisdiction, abandons his wife or child and thereafter fails to provide support.

***6** Jurisdiction over an absent parent who is outside of the state may be obtained in a criminal action under certain circumstances. In the case of State v. Collins, supra, the husband and wife were both living in Georgia when the wife left him because of abuse and ill-treatment and came to Kershaw County, South Carolina, where she subsequently gave birth to a child of the marriage. The husband was convicted of nonsupport in the Court of General Sessions of Kershaw County, and on appeal, he questioned the jurisdiction of that Court. The Supreme Court said that the defendant was guilty of constructive desertion and was thus liable for the support of his family in Kershaw County because his conduct had caused them to seek refuge there. He was guilty of violation of § 25-7-40 CODE (1976) in Kershaw County, and so the Kershaw County Court had proper criminal jurisdiction over him.

D. DETERMINATION OF AMOUNT OF AWARD

The determination of the amount of the award for child support as well as for alimony is placed in the discretion of the trial judge, and such determination will not be overthrown unless an abuse of discretion is clearly shown. Lowe v. Lowe, 256 S.C. 243, 182 S.E.2d 75 (1971). Alimony should be sufficient to maintain the wife and children in their accustomed station in life if the husband is able, the test being his ability to earn. A father cannot support himself in luxury and his family in squalor. Matheson v. McCormack, 186 S.C. 93, 195 S.E. 122 (1938). The most comprehensive statement of the current view of factors to be considered in determining the amount to be awarded for support is given in the case of Graham v. Graham, 253 S.C. 486, 171 S.E.2d 704 (1970), in which the court said:

In arriving at the amount of alimony and child support, the trial judge should take into consideration the needs of the wife and child and the financial ability of the husband and father to meet them, considering his income and assets. It is proper to consider the wife's health, age, general physical condition, and her income and earning capacity. It is also proper to consider the husband's necessities and living expenses in fixing the amount of alimony and child support. The amount of the award for alimony and child support should not be excessive but should be fair and just to all parties.

The Graham case is one of the relatively rare situations in which the Suprme Court felt that the trial judge had abused his discretion in setting the amount of alimony and child support payments, since the amount the husband was ordered to pay constituted ninety-four percent of his monthly income. The case was remanded for reconsideration.

In determining a father's financial ability to support the children of his first marriage, the South Carolina Supreme Court, in Schadel v. Schadel, Opinion No. 20339 (January 5, 1977), took into consideration his second wife income.

E. NODIFICATION OF SUPPORT ORDER

A court decree dealing with the support and maintenance of a wife or child is subjest to modification if warranted by change in circumstances. Jeter v. Jeter, 193 S.C. 278, 8 S.E.2d 490 (1940), Moesley v. Moesley, 263 S.C. 1, 207 S.E.2d 403 (1974).

1. CHANGE IN FINANCIAL CIRCUMSTANCES

***7** Needs of the child beyond the amount the father is required to pay coupled with an increased ability on the part of the father to pay are sufficient grounds to increase child support payments. In the case of Fender v. Fender, 256 S.C. 399, 182 S.E.2d 755 (1971), the lower court had increased an alimony and child support decree based on a change in conditions. At the time the decree had been rendered, the child was five years old and his father was making $15,000.00 per year. At the time of the increase, the child was fourteen years old and his father was making $50,000.00 per year. The Supreme Court affirmed the lower court ruling based on increased upkeep of the child coupled with an increase in the father's income.

In the case of Holtzclaw v. Crawford, 253 S.C. 314, 170 S.E.2d 382 (1969), a husband sought to decrease his alimony and child support payments because his wife had remarried, no longer needed to work, and, as a result, no longer needed to hire a babysitter. The lower court, granted the reduction but was reversed by the Supreme Court, which said that the husband had failed to substantiate his claim of changed conditions and also noted that the husband was making $200.00 per month more than he had been making at the time of the decree.

2. REMARRIAGE OF THE NOTHER

Remarriage of a mother who has custody of a minor child for whom she is receiving support from her former husband does not relieve her former husband from the duty of making child support payments, even though such remarriage might substantially better the mother's financial condition. Modification may be allowed, however, if there is proof that the second husband has assumed the obligation of support of the child. Sanders v. Sanders, 230 S.C. 263, 95 S.E.2d 440 (1956).

3. EMANCIPATION OF CHILD

Emancipation of a minor child, if complete, completely severes the parental relationship as far as legal rights and liabilities are concerned. Emancipation is effectuated by operation of law when the child attains majority, but it may also result from agreement between parent and child. Parker v. Parker, 230 S.C. 23, 94 S.E.2d 12 (1956), Constance v. Gosnell, 62 S. Supt. 253 (W.D.S.C. 1945), Timmerman v. Brown, Opinion No. 20374 (S.C. Supreme Court, March 3, 1977). Emancipation usually results when a minor child marries. Sixty-seven C.J.S. Parent and Child § 89 (1950).

In the case of Grossman v. Grossman, 242 S.C. 298, 130 S.E.2d 850 (1963), the wife was attempting to collect accrued unpaid alimony under an Ohio divorce decree. The decree was subject to retroactive modification in Ohio and thus not entitled to full faith and credit in the South Carolina courts, but our court decided to enforce it under the rule of comity. The decree called for the payment of $130.00 per month for alimony and support of minor children, but did not apportioned the payment between the wife and children. Since the Ohio court had awarded the sum in a gross amount, the wife claimed that the amount in arrears should not be modified to allow for the fact that the children of the parties had reached majority. The South Carolina Supreme Court refused to enforce the decree in the full amount, and instead modified it retroactively to allow for the emancipation of the children.

4. ADOPTION

***8** Adoption establishes the relationship of parent and child and imposes all the legal duties and obligations of that relationship. Cribbs v. Floyd, 188 S.C. 443, 199 S.E. 677 (1938). An adoptive father has a legal obligation to support his adopted child. U. S. v. Blackwell, 238 F. Supp. 342 (1965). At the same time, adoption completely severes all ties between the child and its natural parents. Cox v. Cox, 262 S.C. 8, 202 S.E.2d 6 (1974).

5. CHANGE IN CONDITION OF CHILD

A change in the physical or mental condition of the child is a valid reason for modifying a support order. In the case of Fender v. Fender, supra, the child in question had aged from five years to fourteen years, and the cost of his upkeep had increased. The court awarded an increase in support payment. The recent case of Campbell v. McPherson, Opinion No. 20412 (S.C. Supreme

Court, May 2, 1977), cites the increased age of the child as well as the increased income of her father as valid grounds for increasing child support payments. In another case, Grout v. Alexander, 260 S.C. 655, 197 S.E.2d 826 (19/3), the child of the marriage had been considered at the time of the divorce to be a sound mind. At the time of the wife's petition for increase in child support payments four years later, the child had become mentally ill. The Supreme Court found this to be a sufficient change in circumstances to warrant a modification. Due to the child's mental illness and need for care, no issue was made of the fact that he had reached the age of majority.

6. RETROACTIVE MODIFICATION OF SUPPORT ORDERS

This subject is discussed in the following section on Enforcement.

F. ENFORCEMENT OF SUPPORT ORDER

The Family Court Act, § 14-21-810 (b) CODE (1976) give the court the power to require that the respondent give security in the term of a written undertaking that he will pay in accordance with the court order, and to discharge the undertaking when appropriate. If he fails to give such security, he may be punished for contempt. Rather than requiring an undertaking, the court may place the respondent on probation and determine the conditions of such probation. The court may revoke probation or discharge the respondent from probation. Section 14-21-810 (b) (10) CODE (1976). The court may release on probation a person imprisoned for failure to pay support if it is in the best interest of the family. Section 14-21-810 (b) (11). The court is also given the general power to make any order necessary to carry out and enforce the provisions of the Family Court Act. Section 14-21-810 (b) (17) CODE (1976).

In a contempt hearing under an alimony or child support order, the petitioner need only plead the order for support and the default in payments. This constitutes prima facie case of contempt, and the burden is then on the respondent to show his inability to comply. Mison v. Mison, 253 S.C. 436, 171 S.E.2d 381 (1969). If he is successful in demonstrating to the court that he has been unable to comply with its order, and if he petitions the court to retroactively modify its order, the court may in its discretion forgive part or all of the arrearages owed. Bigham v. Bigham, 264 S.C. 101, 212 S.E.2d 594 (1975).

***9** Although the courts have the power to send a person to jail for breach of his duty to support another, such power is exercised with discretion. In the case of Messerely v. Messerely, 85 S.C. 189, 67 S.E. 130 (1910), a husband had been committed to jail for contempt of court for failure to support his former wife. The husband had little education and no means of earning an income. The court said that in such case the wife was entitled to a judgment even though the judgment debtor was insolvent. If the husband at some later date became able to support the wife, then she could have the judgment enforced, and if he willfully refuse to comply, he would be punished for contempt. The court went on to say that where the husband had no property or income, he could not be compelled by the court to go out and acquire such inorder to pay alimony to his wife any more than he could be compelled to do so to pay any other debt. The court refused to punish him when he was willing to comply with its order, but unable. This case may be compared with the Redick case, supra, in which the court felt that the father did have the ability to earn an income sufficient to support his family, but had refused to exercise such ability. The court was held to have the power to punish him for this refusal. The Bigham case, supra, also discusses this principle.

ATTACHMENT

PATERNITY

..... Why bastard, wherefore base? When my dimensions are as well compact, My mind as generous, and my shape as true, As honest madam's issue? Why brand they us With base? With baseness? bastardy? base, base? ..... As to the legitimate: fine word “legitimate” ..... Now, gods, stand up for bastards'. King Lear, Act I, Scene 2.

I. BACKGROUND AND CURRENT STATUTES

The opinion in the case of McGlohon v. Harlan, supra, gives a brief history of bastardy law in this state. At common law there was no legal duty on the part of the father of an illegitimate child to provide support for his offspring. In 1703, the General Assembly of South Carolina passed an act which imposed a fine upon the mother of an illegitimate child, and upon subsequent convictions, also called for public whippings in the streets of Charlestowne. There were similar penalties for a man found by the Court of General Sessions to be the father of an illegitimate child. Penalties were provided for the mother of an illegitimate child for refusing to identify the father. If the mother swore in court that the defendant was the father of her child, the burden was upon him to prove that he was not. The Act of 1703 was repealed in 1795 and a new Act came into force which placed on the father of an illegitimate child an affirmative duty to support the child with five pounds per year until such child reached the age of twelve. If the accused father should deny paternity, he would receive a jury trial, and if, upon conviction, he still refuse to support the child, he would be bound out to service for a maximum of four years, the proceeds of his labor going for the support of the child. In 1847, the provision that the father of the illegitimate child could be bound out for service was repealed, and the conviction of bastardy was made to carry the same penalties which misdemeanors now carry. The above mentioned statutes were later incorporated into §§ 20-305 through 20-309 of the South Carolina CODE, but these sections were repealed in 1962 when the General Assembly expanded § 20-303 CODE (1962) (§ 25-7-40 CODE 1976) to include illegitimate children. This Code section makes it a misdemeanor for any man who is capable of so doing to fail to support his wife and legitimate or illegitimate children. Under this section, the issue of paternity can be tried in the Court of General Sessions, with a jury rendering the verdict. Family Courts of this state have also been given jurisdiction to determine questions of legitimacy, and this includes all the powers vested in the Circuit Courts. Section 14-21-1050 (3) CODE (1976). The Court in McGlohon v. Harlan, supra, interpreted the use of the word “legitimacy” in the statute to include paternity, although Justice Bussey, in his dissent, disagreed.

II. LITIGATION

A. CRIMINAL ACTIONS

***10** Most of the litigation to determine paternity has been in the criminal courts under the old bastardy statutes or § 20-303 CODE (1962) (§ 25-7-40 CODE 1976) as amended. The sole question to be determined in a paternity action is whether or not the defendant is the father of the child, and the mother's uncorroborated testimony is admissible as evidence even though it may be argued that she is an accomplice to the crime. State v. Adams, 1 Brev. (2 S.C.L.) 279 (1803). It is not necessary to allege that the child is or is about to become a burden on the state if the charges are brought by the mother. If the charges are brought by a third party, however, such facts must be alleged. State v. McDonald, 2 McC. (6 S.C.L.) 299 (1822). An acknowledgement made by the defendant prior to the birth of the child is admissible into evidence. State v. Adams, 100 S.C. 43, 84 S.E. 368 (1914). In an indictment under § 25-7-40 CODE (1976) for nonsupport of an illegitimate child, the illegitimacy of the child should be alleged and the child should be identified with enough specificity so that the defendant will be able to defend himself effectively. State v. Montgomery, 246 S.C. 545, 144 S.E.2d 797 (1965).

The failure to support a child under § 25-7-40 CODE (1976) is a continuing, negative offense, and as such it follows the father from one residence to another. Thus, the court in the county of the father's residence is the proper court in which to bring the suit even though the child may live in a different county. State v. Bailey, 253 S.E. 304, 170 S.E.2d 376 (1969).

B. CIVIL ACTIONS

1. ACTIONS IN THE FAMILY COURT. In McGlohon v. Harlan, supra, the mother of an illegitimate child sued its alleged father in the Laurens County Civil and Family Court for child support and medical expenses incurred at the birth of the child. The Court found that the defendant was the father of the child and ordered him to make appropriate payments. The defendant appealed on the grounds that there was no authority for a civil court to determine paternity without a jury, and that a trial in the Court of General Sessions, under § 20-303 CODE (1962) as amended (§ 25-7-40 CODE 1976), was the only remedy for the determination of paternity. In affirming the Family Court's decision, the Supreme Court said that the right to trial by jury under the Constitution applied only to those cases which require trial by jury at the time of the adoption of the South Carolina

Constitution. The General Assembly had the power to create new rights and new tribunals to adjudicate those rights without a jury. The Court found no constitutional objection to the determination of paternity by a judge without a jury, and thus upheld the jurisdiction of the family courts of this state to determine paternity.

In the recent case of South Carolina Department of Social Services v. Lowman, Opinion No. 20458 (S.C. Supreme Court, June 28, 1977), it was held that paternity suits in the family courts of this state are not barred by the Statutes of Limitations found in § 15-3-530 CODE (1976) and in § 15-1383 CODE (1962) (repealed by implication CODE 1976).

III. PRESUMPTION OF LEGITIMACY

***11** Occasionally the question of the paternity of the child of a married woman arises. In such a situation, the law presumes that the child, if born after a lawful marriage and the lapse of the usual period of gestation, is legitimate, and such presumption, though rebuttable, is one of the strongest presumptions known to law. Neither the mother nor her husband may testify as to access or nonaccess between them, although the mother may testify as to contact with other men. 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 v. Manos Bros., 226 S.C. 257, 84 S.E.2d 357 (1954).

In cases where the legitimacy of a child is being challenged, it is required that a guardian ad litem be appointed to represent the child's interest, and that the child's mother, her husband, the alleged natural father, and the child all be parties to the suit. Prather v. Tupper, ___ S.C. __, 230 S.E.2d (1976).

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