UNDERSTANDING THE DISTINCTION BETWEEN INTRINSIC AND EXTRINSIC FRAUD & DETERMINING WHEN EITHER OR BOTH ARE ADMISSIBLE AS EVIDENCE[1]

Family Law Hot Tips CLE
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[1] This article was last updated in 2006, and the cases and statutes have not been updated since then. Thus, Melissa F. Brown, LLC, assumes no liability or responsibility for errors or omissions in this article.

Custody, visitation, alimony and child support are all matters within the exclusive jurisdiction of the Family Court, and they are matters which the Family Court retains jurisdiction over even after the issuance of a final order. As a result, family court practitioners may find themselves addressing situations in post-divorce actions where they discover important facts that existed at the time of the initial action, but were not uncovered until the subsequent action. These facts, while probably critical had they been uncovered in the first action, may still remain critical to your client's case in the subsequent action. The challenge then becomes convincing a judge to admit this information into evidence.

First, as long as the facts from the prior action are relevant to the subsequent action and not the basis for the alleged "significant change of circumstances," judges will usually admit such facts into evidence. Where proof of a witness' prior perjury or forgery or misrepresentation comes to light in the second action, the test becomes be a little more difficult. Obviously, attacking the opposing party's credibility with their past bad acts or proving a pattern of bad behavior can be critical to disprove the other party's attempt to increase alimony, reduce child support or to gain custody of children.

Another likely scenario is where an Ex-Husband files a post-divorce action to reduce his alimony obligation to his Ex-Wife. Assume during the discovery process in the subsequent action, Ex-Wife learns Ex-Husband misrepresented and lied about his income during the previous divorce. Is evidence of such acts which occurred during the divorce admissible as evidence in the second action?

Knowing the difference between intrinsic and extrinsic fraud may be the key to getting this information admitted into evidence by the court. Our appellate courts have discussed the distinction between intrinsic and extrinsic fraud in fifteen cases since 1951, and in ten cases, the

subject of the cases dealt mainly with these two types of fraud.[2] If your trial judge is familiar with the distinction between the two types of fraud but unfamiliar in determining when either or both are admissible, you may get a bad ruling.

Intrinsic fraud is defined as "fraud which misleads a court in determining issues and induces the court to find for the party perpetrating the fraud. The classic case of intrinsic fraud is perjured testimony or presenting forged documents at trial. Allegations that a party failed to disclose documents also generally amount to intrinsic, rather than extrinsic, fraud." [3]

Extrinsic Fraud, on the other hand, is "'fraud that induces a person not to present a case or deprives a person of the opportunity to be heard.'"[4] While the court noted in *Raby* and *Chewning* that "[i]n order to secure equitable relief on the basis of fraud, the fraud must be extrinsic,"[5] the court also pointed out that "intrinsic fraud is not a valid ground for setting aside a judgment.[6]

All the South Carolina appellate cases addressing the distinction between the two types of fraud are noted herein in footnote 2, and all arose from a party's attempt to file a Rule 60(b)(3)

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[2] *Raby v. Orr*, 358 S.C. 10, 594 S.E.2d 478 (2004) (Intrinsic fraud was misrepresentation about accounting practices), *Bowman v. Bowman*, 375 S.C. 146, 591 S.E.2d 654 (Ct. App. 2004)(Intrinsic fraud was failure to disclose information about retirement account), *Chewning v. Ford Motor Co.*, 354 S.C. 72, 79 S.E.2d 605 (2003)(Fraud upon the court by an attorney, whether or not intrinsic or extrinsic, can be used to set aside a prior judgment), *Chewning v. Ford Motor Co*., 345 S.C. 28, 550 S.E.2d 584 (Ct. App. 2001)(Fraud upon the court by an attorney, whether or not intrinsic or extrinsic, can be used to set aside a prior judgment and court declined to follow reasoning of *Bankers Trust v. Braten*, 317 S.C. 547, 455 S.E. 2d 199 (Ct. App. 1995)), *Hagy v. Pruitt*, 339 S.C. 425, 529 S.E.2d 714 (2000) (Misrepresentation to obtain consent for adoption is extrinsic fraud but party failed to prove extrinsic fraud here by clear and convincing evidence),*Mr. G. v. Mrs. G*, 320 S.C. 305, 465 S.E.2d 101 (Ct. App. 1995)(Misrepresentation about parentage is intrinsic fraud), *Evans v. Gunter*, 294 S.C. 525, 366 S.E.2d 44 (Ct. App. 1988)(Perjury was intrinsic fraud but court also found extrinsic fraud where a party was induced to sign a waiver form which denied his opportunity to be heard), *Hilton Head Center of SC, Inc. v. Public Service Commission of SC*, 294 S.C. 9, 362 S.E.2d 176 (1987)(Intrinsic fraud was misrepresentation),*Ex Parte Corley*, 247 S.C. 179, 146 S.E.2d 609 (1966)(Intrinsic fraud was perjury and false testimony), *Bryan v. Bryan*, 220 S.C. 164, 66 S.E.2d 609 (1951)(Intrinsic fraud was perjured testimony).

[3] *Raby Const. LLP v. Orr*; 358 S.C. 10, 594 S.E.2d 478 (2004)(citing *Chewning*, 354 S.C. at 82, 579 S.E.2d at 610-11). See, e.g., *Bryan v. Bryan*, 220 S.C. at 169, 66 S.E.2d at 611; James F. Flanagan, South Carolina Civil Procedure at 485 (2d ed. 1996).

[4] *Id*. 358 S.C. at 19, 594 S.E.2d at 483(citing *Chewning*, 354 S.C. at 81, 579 S.E.2d 610).

[5] *Id*. 358 S.C. at 19, 594 S.E.2d at 482 (citing *Chewning*, supra).

[6] *Id*. 358 S.C. at 18, 594 S.E.2d at 482 (As long as intrinsic fraud is relevant or can be used to attack a witness'

motion to set aside a prior judgment. South Carolina Rules of Civil Procedure Rule 60(b)(3).[7] [8] In these circumstances, intrinsic fraud may not be used to set aside a judgment unless the intrinsic fraud was misrepresentation by an attorney.[9]

Attempting to admit facts into evidence in a subsequent trial, however, is clearly distinguishable from Rule 60 (b)(3) motions to set aside a prior judgment. Thus, understanding the distinction between these two different situations could be one of the keys to have critical information admitted into evidence.

If you are faced with an objection from opposing counsel when attempting to introduce such evidence, also consider arguing that the information is relevant under SCRE 402[10] and point out that if evidence has any tendency to make a material fact more or less probable than it would be without the evidence, it is relevant.

Attacking a witness' credibility on cross examination based on the witness' specific instances of conduct is another argument to have the evidence admitted.[11] According to my good friend Warren Moise, this is the weaker argument because appellate courts are skeptical of Rule 608(b), and therefore, appellate courts rarely reverse a trial judge's decision for exclusion of

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credibility on cross-examination, such fraud is clearly admissible in the initial action.)

[7] "(b) Mistakes; Inadvertence; Excusable Neglect; Newly Discovered Evidence; Fraud, etc. On motion and upon such terms as are just, the court may relieve a party or his legal representative from a final judgment, order, or proceeding for the following reasons: . . . (3) fraud, misrepresentation, or other misconduct of an adverse party."

[8] "Federal Rule 60(b)(3), by its express terms, **permits judgments to be set aside** for fraud, whether the fraud is intrinsic or extrinsic." *Mr. G. v. Mrs. G*, 320 S.C. 305, 465 S.E.2d 101 (Ct. App. 1995), fn. 2. (emphasis added).

[9] *Chewning v. Ford Motor Co*., 345 S.C. 28, 550 S.E.2d 584 (Ct. App. 2001)(Fraud upon the court by an attorney, whether or not intrinsic or extrinsic, can be used to set aside a prior judgment and court declined to follow reasoning of *Bankers Trust v. Braten*, 317 S.C. 547, 455 S.E. 2d 199 (Ct. App. 1995)).

[10] "All relevant evidence is admissible, except as otherwise provided by the Constitution of the United States, the Constitution of the State of South Carolina, statutes, these rules, or by other rules promulgated by the Supreme Court of South Carolina. Evidence which is not relevant is not admissible."

[11] SCRE 608(b) "(b) Specific Instances of Conduct. Specific instances of the conduct of a witness, for the purpose of attacking or supporting the witness' credibility, other than conviction of crime as provided in **Rule** 609, may not be proved by extrinsic evidence. They may, however, in the discretion of the court, if probative of truthfulness or untruthfulness, be inquired into on cross-examination of the witness (1) concerning the witness' character for truthfulness or untruthfulness, or (2) concerning the character for truthfulness or untruthfulness of another witness as to which character the witness being cross-examined has testified. The giving of testimony, whether by an accused

evidence under this rule.

Another argument to justify the admission is the "time honored equitable maxim that all courts have the inherent power to all things reasonable necessary to ensure that just results are reached to the fullest extent possible."[12] Arguing unclean hands might also convince the judge to rule with you. Recently our Supreme Court relied upon the equitable principle of unclean hands.[13] The Court cited *First Union Nat'l Bank of S.C. v. Soden*,[14] which held that the doctrine of unclean hands will preclude a litigant from recovering in equity if that litigant acted unfairly to the detriment of the other party. In *Buckley*, the court further held that the "Husband is not a party deserving of equitable treatment because of his own misdeeds in dealing with Wife and the court. Accordingly, we reverse the family court's decision awarding the Husband a set-off."[15] Therefore, *Buckley* may provide the practitioner with a recent equitable argument issued by our Supreme Court which does not look favorably upon those who are undeserving and who try to use the court rules to obtain a benefit they do not deserve.

And, as Warren Moise cites in the beginning of his new book *Credibility and Character Evidence: History, Policy and Procedure*, "Litigants should lose cases when the facts or the rules of substantive law are against them. They should not lose because their lawyer and judge disagreed on some fine point of evidence law."[16] Thus, the Hot Tip is:

> **Know the difference between intrinsic and extrinsic fraud and Understand when the distinction affects the admissibility of the fraudulent act to convince the court to admit such evidence into the record, especially when it is critical to your case, because**

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or by any other witness, does not operate as a waiver of the accused's or the witness' privilege against self-incrimination when examined with respect to matters which relate only to credibility."

[12] *Buckley v. Shealy*, 370 S.C. 317, 323, 635 S.E.2d 76, 79(2006); *See also, Ex Parte Dibble*, 279 S. C. 592, 595-96, 310 S.E.2d 440, 442 (Ct. App. 1983).

[13] *Id.*

[14] 333 S. C. 5t4, 568-69, 511 S.E.2d 372 (Ct. App. 1998).

[15] *Buckley*, 370 S.C. at 325, 635 S.E.2d at 80.

[16] 1 E. Warrant Moise, *Credibility and Character Evidence: History, Policy and Procedure* (2003)(citing James F. Dresher, *A Guide to S.C. Evidence* 93 (1967)).

as long as the evidence is relevant and goes to the heart of the matter and it is not the basis for the significant changes of circumstances, the court should admit such evidence into the record.

Trial Notebook Evidence Re: Fraud

Intrinsic fraud is defined as "fraud which misleads a court in determining issues and induces the court to find for the party perpetrating the fraud. The classic case of intrinsic fraud is perjured testimony or presenting forged documents at trial. Allegations that a party failed to disclose documents also generally amount to intrinsic, rather than extrinsic, fraud." *Raby Const. LLP v. Orr*; 358 S.C. 10, 594 S.E.2d 478 (2004)(citing *Chewning*, 354 S.C. at 82, 579 S.E.2d at 610-11). See, e.g., *Bryan v. Bryan*, 220 S.C. at 169, 66 S.E.2d at 611; James F. Flanagan, South Carolina Civil Procedure at 485 (2d ed. 1996).

Extrinsic Fraud, on the other hand, is "'fraud that induces a person not to present a case or deprives a person of the opportunity to be heard.'" *Id*. 358 S.C. at 19, 594 S.E.2d at 483 (citing *Chewning*, 354 S.C. at 81, 579 S.E.2d 610). While the court noted in *Raby* and *Chewning* that "[i]n order to secure equitable relief on the basis of fraud, the fraud must be extrinsic," *Id*. 358 S.C. at 19, 594 S.E.2d at 482 (citing *Chewning*, supra), the court also pointed out that "intrinsic fraud is not a valid ground for setting aside a judgment. *Id*. 358 S.C. at 18, 594 S.E.2d at 482.[17]

SCRCP Rule 60(b)(3)

"(b) Mistakes; Inadvertence; Excusable Neglect; Newly Discovered Evidence; Fraud, etc. On motion and upon such terms as are just, the court may relieve a party or his legal representative from a final judgment, order, or proceeding for the following reasons: . . . (3) fraud, misrepresentation, or other misconduct of an adverse party."

Federal Rules of Civil Procedure Rule 60(b)(3)

"Federal Rule 60(b)(3), by its express terms, **permits judgments to be set aside** for fraud, whether the fraud is intrinsic or extrinsic." *Mr. G. v. Mrs. G*, 320 S.C. 305, 465 S.E.2d 101 (Ct. App. 1995), fn. 2. (emphasis added).

SCRE 402

"All relevant evidence is admissible, except as otherwise provided by the Constitution of the United States, the Constitution of the State of South Carolina, statutes, these rules, or by other rules promulgated by the Supreme Court of South Carolina. Evidence which is not relevant is not admissible."

SCRE 608 (b)

"(b) Specific Instances of Conduct. Specific instances of the conduct of a witness, for the purpose of attacking or supporting the witness' credibility, other than conviction of crime as provided in **Rule** 609, may not be proved by extrinsic evidence. They may, however, in the discretion of the court, if probative of truthfulness or untruthfulness, be inquired into on cross-examination of the witness (1) concerning the witness' character for truthfulness or untruthfulness, or (2) concerning the character for truthfulness or untruthfulness of another witness as to which character the witness being cross-examined has testified. The giving of testimony, whether by an accused or by any other witness, does not operate as a waiver of the

[17] As long as intrinsic fraud is relevant or can be used to attack a witness' credibility on cross-examination, such fraud is clearly admissible in the initial action.

accused's or the witness' privilege against self-incrimination when examined with respect to matters which relate only to credibility."

Equitable Arguments

"The time honored equitable maxim that all courts have the inherent power to all things reasonable necessary to ensure that just results are reached to the fullest extent possible." *Buckley v. Shealy*, 370 S.C. 317, 323, 635 S.E.2d 76, 79(2006); *See also*, *Ex Parte Dibble*, 279 S. C. 592, 595-96, 310 S.E.2d 440, 442 (Ct. App. 1983).

Unclean Hands:
The doctrine of unclean hands will preclude a litigant from recovering in equity if that litigant acted unfairly to the detriment of the other party. *Buckley v. Shealy*, 370 S.C. 317, 635 S.E.2d 76, (2006). In *Buckley*,(citing *First Union Nat'l Bank of S.C. v. Soden*, 333 S. C. 5t4, 568-69, 511 S.E.2d 372 (Ct. App. 1998). Our Supreme Court further held that the "Husband is not a party deserving of equitable treatment because of his own misdeeds in dealing with Wife and the court. Accordingly, we reverse the family court's decision awarding the Husband a set-off." *Buckley v. Shealy*, 370 S.C. 317, 325, 635 S.E.2d 76, 80 (2006). Therefore, *Buckley* may provide the practitioner with a recent equitable argument issued by our Supreme Court which does not look favorably upon those who are undeserving and who try to use the court rules to obtain a benefit they do not deserve.

"Litigants should lose cases when the facts or the rules of substantive law are against them. They should not lose because their lawyer and judge disagreed on some fine point of evidence law." 1 E. Warrant Moise, *Credibility and Character Evidence: History, Policy and Procedure* (2003)(citing James F. Dreher, *A Guide to S.C. Evidence* 93 (1967)).

HOT TIP REGARDING ADMISSION OF FRAUDULENT EVIDENCE IN SUBSEQUENT TRIAL WHICH AROSE DURING PRIOR ACTION:

As long as the evidence is relevant and goes to the heart of the matter but is not the basis for the significant changes of circumstances, the court should admit such evidence into the record.

EXHIBIT A

Separate Maintenance and Support

20-3-130(B)(5) Separate maintenance and support to be paid periodically, but terminating upon the continued cohabitation of the supported spouse, upon the divorce of the parties, or upon the death of either spouse (except as secured in subsection (D)) and terminable and modifiable based upon changed circumstances in the future.

EXHIBIT B

Periodic Alimony

S.C. Code Ann. 20-3-130(B)(1)(Supp.)

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 or continued cohabitation 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. The purpose of this form of support may include, but is not limited to, circumstances where the court finds it appropriate to order the payment of alimony on an ongoing basis where it is desirable to make a current determination and requirement for the ongoing support of a spouse to be reviewed and revised as circumstances may dictate in the future.

S.C. Code Ann. 20-3-170 (Supp.). Modification, confirmation or termination of alimony.

Whenever any husband or wife, pursuant to a judgment of divorce from the bonds of matrimony, has been required to make his or her spouse any periodic payments of alimony and the circumstances of the parties or the financial ability of the spouse making the periodic payments shall have changed since the rendition of such judgment, either party may apply to the court which rendered the judgment for an order and judgment decreasing or increasing the amount of such alimony payments or terminating such payments and the court, after giving both parties an opportunity to be heard and to introduce evidence relevant to the issue, shall make such order and judgment as justice and equity shall require, with due regard to the changed circumstances and the financial ability of the supporting spouse, decreasing or increasing or confirming the amount of alimony provided for in such original judgment or terminating such payments. Thereafter the supporting spouse shall pay and be liable to pay the amount of alimony payments directed in such order and judgment and no other or further amount and such original judgment, for the purpose of all actions or proceedings of every nature and wherever instituted, whether within or without this State, shall be deemed to be and shall be modified accordingly, subject in every case to a further proceeding or proceedings under the provisions of this section in relation to such modified judgment.

EXHIBIT C

Custody and Visitation

S.C. Code 20-7-934. Enforcement or modification of orders of other courts; transfer of cases.

Any family court has jurisdiction and authority to enforce or modify an order or decree of any other court respecting support of wife or children subject to the limitations contained in Section 20-7-933, custody of children and visitation upon an order from the court of original jurisdiction, transferring jurisdiction to the family court.

20-7-788. Jurisdiction. UCCJA

(a) A court of this State which is competent to decide child custody matters has jurisdiction to make a child custody determination by initial or modification decree if:

(1) this State (i) is the home state of the child at the time of commencement of the proceeding, or (ii) had been the child's home state within six months before commencement of the proceeding and the child is absent from this State because of his removal or retention by a person claiming his custody or for other reasons, and a parent or person acting as parent continues to live in this State; or

(2) it is in the best interest of the child that a court of this State assume jurisdiction because (i) the child and his parents, or the child and at least one contestant, have a significant connection with this State and (ii) there is available in this State substantial evidence concerning the child's present or future care, protection, training and personal relationships; or

(3) the child is physically present in this State and (i) the child has been abandoned or (ii) it is necessary in an emergency to protect the child because he has been subjected to or threatened with mistreatment or abuse or is otherwise neglected or dependent; or

(4) (i) it appears that no other state would have jurisdiction under prerequisites substantially in accordance with paragraphs (1), (2) or (3) of subsection (a), or another state has declined to exercise jurisdiction on the ground that this State is the more appropriate forum to determine the custody of the child and (ii) it is in the best interest of the child that this court assume jurisdiction.

(b) Except under paragraphs (3) and (4) of subsection (a), physical presence in this State of the child, or of the child and one of the contestants, is not alone sufficient to confer jurisdiction on a court of this State to make a child custody determination.

(c) Physical presence of the child, while desirable, is not a prerequisite for jurisdiction to determine his custody.

CUSTODY VISITATION CASE LAW

Custody:
The family court retains jurisdiction to transfer custody of children "in the event of changed conditions, or for other valid reasons." *Wolfe v. Wolfe*, 220 S.C. 437, 441, 68 S.E.2d 348, 350 (1951).

Visitation:
"Absent an appeal of the original decree fixing the visitation rights of the non-custodial parent, visitation is still subject to the continuing jurisdiction of the family court to modify rights previously established upon a showing that such modification would serve the best welfare and interests of the child." *Porter v. Porter*, 246 S.C. 332, 143 S.E.2d 619 (1965); *McGregor v. McGregor*, 255 S.C. 179, 177 S.E.2d 599 (1970); See also, *King v. Gardner*, 274 S.C. 493, 265 S.E.2d 260 (1980)(change in visitation can be awarded upon a showing of changed circumstances).

EXHIBIT D
Child Support

S.C. Code 20-7-933 (Supp.). Authority of Family Court to enforce decrees, judgments, or orders regarding child support; authority to hold arrearages in abeyance.

The family court has the authority to enforce the provisions of any decree, judgment, or order regarding child support of a court of this State, including cases with jurisdiction based on the revised Uniform Reciprocal Enforcement of Support Act,[18] provided that personal jurisdiction has been properly established. This authority includes the right to modify any such decree, judgment, or order for child support as the court considers necessary upon a showing of changed circumstances. No such modification is effective as to any installment accruing prior to filing and service of the action for modification. Additionally, the family court has the right to hold any arrearage in child support in abeyance.

[18] This statute is now called the Uniform Interstate Family Support Act.