The Supreme Court of South Carolina

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N O T I C E

IN THE MATTER OF THOMAS M. RICHARDSON, JR., PETITIONER

On October 27, 1997, Petitioner was indefinitely suspended from the practice of law, retroactive to May 10, 1996. In the Matter of Richardson, 328 S.C. 161, 492 S.E.2d 788 (1997).

Pursuant to Rule 33(e)(2) of the Rules for Lawyer Disciplinary Enforcement contained in Rule 413, SCACR, notice is hereby given that members of the bar and the public may file a notice of their opposition to or concurrence with the Petition for Reinstatement. Comments should be mailed to:

Committee on Character and Fitness
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Columbia, South Carolina 29211

These comments should be received no later than August 1, 2005.

Columbia, South Carolina

June 1, 2005

OPINIONS

OF

THE SUPREME COURT

AND

COURT OF APPEALS

OF

SOUTH CAROLINA

ADVANCE SHEET NO. 23

June 6, 2005

Daniel E. Shearouse, Clerk
Columbia, South Carolina
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THE STATE OF SOUTH CAROLINA
In The Supreme Court

Ex Parte: South Carolina Department of Health and Human Services, Appellant,

In re: State Farm Mutual Automobile Insurance Company, Plaintiff,

v.

Justin Jackson, a minor under the age of fourteen (14) years; Paul M. Jackson, III, a minor under the age of fourteen (14) years; Tesa K. Jackson, a minor under the age of fourteen (14) years; Joseph Rakes, a minor under the age of fourteen (14) years; and Nikkia Rakes, a minor under the age of fourteen (14) years, Respondents.

Appeal from Anderson County
Joseph J. Watson, Circuit Court Judge

Opinion No. 25852
Heard June 24, 2003 – Filed August 9, 2004
Reheard January 20, 2005 – Refiled June 6, 2005

AFFIRMED IN RESULT

George R. Burnett, South Carolina Department of Health and Human Services, of Columbia, for Appellant.

Patricia Logan Harrison, of Columbia, for Respondents.

CHIEF JUSTICE TOAL: This case was certified for review pursuant to SCACR 204(b). After hearing oral arguments, this Court issued an opinion affirming the trial judge's decision to distribute insurance proceeds into Special Needs Trusts for the injured children and to grant the South Carolina Department of Health and Human Services ("Medicaid") a right to the proceeds upon the children's death. *Ex Parte: South Carolina Dep't of Health and Human Services*, Op. No. 25529 (S.C. Sup. Ct. filed August 9, 2004) (Shearouse Adv. Sh. No. 31 at 42). We subsequently granted Medicaid's petition for rehearing, and following rehearing, we withdraw our prior opinion and substitute it with this opinion. For a different reason than in our prior opinion, we affirm the trial judge's decision.

FACTUAL / PROCEDURAL BACKGROUND

Five fourteen-year-olds were injured in a single-car automobile accident in 1999. The children were treated for their injuries, which were minor for Paul Jackson, Joseph Rakes, and Tesa Jackson and extensive for Justin Jackson (Justin) and Nikkia Rakes (Nikkia).[1] Medicaid paid $92,494.18 of approximately $183,000 in medical costs for Justin, and it paid $28,911.71 of approximately $105,000 in costs for Nikkia.

State Farm Insurance Company (Insurer) filed an interpleader action, asking the court to "allocate the allegedly available insurance proceeds" among the five children.[2] In total, the driver's policy consisted of a $50,000

[1] Justin suffered a closed-head injury, which resulted in major brain damage. He is confined to a wheelchair. Nikkia suffered a spinal injury and will never walk again.

[2] Although Insurer offered to pay the proceeds, Insurer specifically denied liability throughout the complaint.

liability policy and two $50,000 underinsured motorist policies. At the hearing, Medicaid appeared and argued that it was to be reimbursed before the proceeds could be paid to the children.

The trial judge ruled that the proceeds from the underinsured policies were not subject to subrogation and assignment, and therefore, Medicaid only had a claim to the $50,000 in proceeds stemming from the liability policy. The judge then distributed the available funds among the five children, placing the proceeds for Nikkia and Justin into Special Needs Trusts[3] for their benefit during their lifetime. In addition, the judge noted that Medicaid would be permitted, upon the children's deaths, to recover any proceeds remaining in the trusts. Finally, the trial judge awarded Medicaid $6,000, representing one-third of the liability insurance proceeds given to the other three children.[4]

Medicaid appealed and raised the following issue for review:

> Did the trial judge err in placing the insurance proceeds into Special Needs Trusts before satisfying Medicaid's claim to those proceeds?

LAW/ANALYSIS

Medicaid argues that the trial judge erred in placing the insurance proceeds into Special Needs Trusts before satisfying Medicaid's claim to those proceeds. We disagree. Because Medicaid was unable to establish that it had obtained an enforceable assignment of rights, Medicaid was not immediately entitled to the proceeds.

In order to receive Medicaid benefits, an individual must "assign the State any rights, of the individual or of any other person who is eligible for medical assistance … and on whose behalf the individual has the legal

[3] A Special Needs Trust is a type of trust permitted under federal law pursuant to 42 U.S.C. 1396p(d)(4)(A) (2000).

[4] No issue was raised regarding the proceeds given to the other three children.

authority to execute an assignment of such rights, to support . . . and to payment for medical care from any third party." 42 U.S.C. § 1396k(a)(1)(A) (2000). Under South Carolina statutory law, such an assignment of rights is automatic. *See* S.C. Code Ann. § 43-7-420(A) (Supp. 2002) (providing that "[e]very applicant or recipient, only to the extent of the amount of medical assistance paid by Medicaid, *shall be deemed* to have assigned his rights to recover") (emphasis added). Federal law, however, provides the following safeguard: "[i]f assignment of rights to benefits is automatic because of State law, the [state agency] may substitute such an assignment for an individual executed assignment, *as long as the [state agency] informs the individual of the terms and consequences of the State law*." 42 C.F.R. § 433.146(c) (emphasis added).

In the present case, Medicaid admitted that it did not have a written assignment of rights.[5] In addition, there is no evidence in the record that Medicaid informed the recipients of the consequences of receiving treatment covered by Medicaid. In fact, at the rehearing before this Court, counsel for Medicaid confirmed that there was no evidence that a written assignment had been made or that the recipients had otherwise been informed of the law. Due to the lack of evidence that a valid assignment, whether actual or constructive, was obtained, we hold that Medicaid did not have an immediate right to the proceeds. Therefore, the trial judge's decision to place the proceeds in the trusts before reimbursing Medicaid was proper.

Under the terms of a Special Needs Trust, however, Medicaid is entitled to receive any funds remaining in the trusts upon the death of Justin and Nikkia. *See* 42 U.S.C. § 1396(p)(d)(4)(A) (2000) (providing that "the State will receive all amounts remaining in the trust upon the death of [an individual under age 65 who is disabled] up to an amount equal to the total medical assistance paid on behalf of the individual under [Medicaid]").

[5] We do not, as the dissent suggests, hold that an assignment of rights must be in writing. We merely note that there is no evidence in the record that Medicaid obtained a written assignment. At oral argument before this Court, counsel for Medicaid stated that it was Medicaid's *practice* to obtain assignments of rights in writing, which in our view makes sense, particularly in cases such as this one, where the recipients are minors.

Therefore, the trial judge properly found that Medicaid had a right to the proceeds remaining in the trusts upon the children's death.

CONCLUSION

Based on the absence of an enforceable assignment of rights, we affirm the trial judge's decision to place the insurance proceeds into Special Needs Trusts before reimbursing Medicaid. Medicaid is, however, entitled to receive any funds remaining in the trusts upon the children's death. Therefore, we affirm the trial judge's decision in result.

MOORE and WALLER, JJ., concur. PLEICONES, J., dissenting in a separate opinion in which BURNETT, J., concurs.

JUSTICE PLEICONES: As I understand Medicaid, a prerequisite to enrollment in the program is the assignment of third party medical benefits. In the case of minors such as Justin and Nikkia, the assignment is to be made by the individual with the legal authority to execute such an assignment on the minor's behalf. I can find no statutory requirement that the assignment be written, as the majority suggests is necessary. Further, given that the assignment issue was not litigated below, it is not surprising that the record contains no evidence concerning compliance. I therefore respectfully dissent from the majority's decision to affirm at this juncture, and would remand to allow this issue to be explored.

BURNETT, J., concurs.

THE STATE OF SOUTH CAROLINA
In The Supreme Court

Thomas Durrette Wooten, Jr.,	Plaintiff,
v.	
Mona Rae Wooten,	Defendant and Third Party Plaintiff,
v.	
Pam Perry,	Third Party Defendant,
of whom Thomas Durrette Wooten, Jr., is	Petitioner/Respondent
and Mona Rae Wooten, is	Respondent/Petitioner.

AND

Thomas Durrette Wooten, Jr.,	Respondent,
v.	
Mona Rae Howell Wooten,	Petitioner.

ORDER

Respondent/Petitioner (Wife) filed a petition for rehearing in which she asked the Court to clarify whether it intended to reverse the Court

of Appeals' remand of the issue of the alimony award to the family court. Petitioner/Respondent (Husband) filed a return in opposition.

We grant the petition for rehearing, withdraw the former opinion, and substitute the attached opinion.

IT IS SO ORDERED.

s/Jean H. Toal C.J.

s/James E. Moore J.

s/John H. Waller, Jr. J.

s/E. C. Burnett, III J.

s/Costa M. Pleicones J.

Columbia, South Carolina

June 6, 2005

THE STATE OF SOUTH CAROLINA
In The Supreme Court

Thomas Durrette Wooten, Jr.,	Plaintiff,
v.	
Mona Rae Wooten,	Defendant and Third Party Plaintiff,
v.	
Pam Perry,	Third Party Defendant,
of whom Thomas Durrette Wooten, Jr., is	Petitioner/Respondent
and Mona Rae Wooten, is	Respondent/Petitioner.

AND

Thomas Durrette Wooten, Jr.,	Respondent,
v.	
Mona Rae Howell Wooten,	Petitioner.

ON WRIT OF CERTIORARI TO THE COURT OF APPEALS

Appeal From Charleston County
Judy C. Bridges, Family Court Judge

Opinion No. 25977
Heard March 2, 2005 – Filed May 2, 2005
Refiled June 6, 2005

AFFIRMED IN PART; REVERSED IN PART

Robert N. Rosen of Rosen Law Firm, LLC, of Charleston, and Donald B. Clark, of Charleston, for Mona Rae Wooten (Respondent/Petitioner and Petitioner).

James T. McLaren and C. Dixon Lee, III, both of McLaren & Lee, of Columbia; and Lon H. Shull, III, of Andrews & Shull, PC, of Mt. Pleasant, for Thomas Durrette Wooten, Jr. (Petitioner/Respondent and Respondent).

JUSTICE BURNETT: This divorce case raises issues related to equitable distribution and alimony. We granted both parties' petitions for a writ of certiorari in one appeal and a certiorari petition in the second appeal to review issues addressed in two opinions issued by the Court of Appeals. Wooten v. Wooten, 356 S.C. 473, 589 S.E.2d 769 (Ct. App. 2003); Wooten v. Wooten, 358 S.C. 54, 594 S.E.2d 854 (Ct. App. 2003). We consolidate the two appeals for review and resolution. See Rule 214, SCACR. We affirm in part and reverse in part.

FACTUAL AND PROCEDURAL BACKGROUND

Thomas D. Wooten, Jr. (Husband) and Mona Rae Wooten (Wife) were married in 1976. The couple met in Columbia while Husband was in medical residency training and moved to Johns Island in 1981, where they lived until Husband moved out of the marital home in 1999. Both parties had adulterous affairs in the mid-1980s, but admitted the affairs to each other,

attended counseling sessions, and reconciled. Wife testified Husband's decision to leave surprised her and she believed their marriage, while not perfect, was solid.

Husband, now age 56, is an anesthesiologist with a gross annual income of $217,000. Wife, a registered nurse by training, is a county deputy coroner with a gross annual income of $47,000. After moving to Johns Island, Wife stayed home for several years to care for the couple's three young children. The children were emancipated at the time of trial. Wife also managed the billing of Husband's patients to increase the family's income. Wife's business duties ended in 1987 when Husband hired a secretary to do the billing and then later merged his practice with other anesthesiologists.

The couple and their children lived an affluent lifestyle. They extensively renovated and expanded their home in the early 1980s and often entertained family and friends on weekends at the home and on their boat. Husband frequently went fishing and hunting. They belonged to a country club and regularly went out to dinner. Husband bought and sold several boats during the marriage, including at least one capable of deep-sea fishing trips, and kept two boats valued at $30,000 as part of his division of the couple's personal property.

Husband began a adulterous relationship before marital litigation commenced. Husband admitted his misconduct and has not appealed the family court's grant of a divorce to Wife on the ground of adultery.

The parties agreed on an equal division of the $1.3 million marital estate, which consisted primarily of the $675,000 marital home, which was subject to mortgages totaling $230,625; Husband's retirement and pension accounts of $844,026; the $41,000 valuation of Husband's interest in his medical practice; and Wife's retirement account of $11,077.

The family court, essentially adopting a proposal offered by Wife's accountant, divided the marital assets equally by awarding the marital home to Wife and the bulk of Husband's retirement accounts to him. Husband also was ordered to pay Wife $4,300 per month in alimony, with

Wife receiving $2,867 per month after taxes. The family court denied Wife's request Husband secure the alimony award by maintaining a life insurance policy naming her as beneficiary. The family court ordered Husband to pay Wife's attorney's fees of $52,917.

ISSUES

I. Did the Court of Appeals err in reversing the family court's decision to award the marital home to Wife in equitably distributing the marital estate?

II. Did the Court of Appeals err in reversing the family court's decision to award a credit card debt, incurred by Wife after marital litigation began, to Husband in equitably distributing the marital estate?

III. Did the Court of Appeals err in affirming the family court's decision not to require Husband to secure an alimony award to Wife with a life insurance policy naming Wife as beneficiary?

IV. Did the Court of Appeals err in affirming the family court's decision to require Husband to pay Wife's attorney's fees and costs, where the Court of Appeals reversed the family court's decision in favor of Wife on the primary issues in dispute?

STANDARD OF REVIEW

In appeals from the family court, an appellate court has the authority to find the facts in accordance with its own view of the preponderance of the evidence. Rutherford v. Rutherford, 307 S.C. 199, 414 S.E.2d 157 (1992); Owens v. Owens, 320 S.C. 543, 466 S.E.2d 373 (Ct. App. 1996). This broad scope of review does not, however, require the appellate court to disregard the findings of the family court. Stevenson v. Stevenson, 276 S.C. 475, 279 S.E.2d 616 (1981). Neither is the appellate court required to ignore the fact that the family court, who saw and heard the witnesses, was in a better position to evaluate their credibility and assign comparative weight

to their testimony. Cherry v. Thomasson, 276 S.C. 524, 280 S.E.2d 541 (1981).

LAW AND ANALYSIS

I. MARITAL HOME

Testimony during the five-day trial focused primarily on the equitable division of the two major marital assets – the marital home and the retirement accounts. Husband sought to have the assets divided equally by awarding half the retirement accounts to each, selling the house to take full advantage of the $500,000 capital gains tax exclusion for married spouses, and dividing the sale proceeds so that each party could purchase a smaller house with no mortgage.

Husband and his accountant testified that, if Wife were awarded the home, Husband would suffer tax and withdrawal penalties equaling fifty-one percent of any funds he withdrew if required to liquidate his retirement accounts to satisfy the equitable division award and make a substantial down-payment on a home for himself. Wife sought to keep the house as part of her division of the marital estate.

The family court divided the primary marital property and debts in a manner which gave each party a net total of $664,078. Husband received assets of $590,087 in IRA retirement funds, $116,543 in his medical practice's retirement pension, the $41,000 value of his medical practice, and debt of $71,230 (representing 75 percent of the home equity line) and a credit card debt of $12,322. Wife received assets of the $675,000 marital home, $137,395 from Husband's IRA account, her retirement fund of $11,077, and debts of $135,651 for the first mortgage on the marital home and $23,743 (representing 25 percent of the home equity line).[1]

[1] Recognizing the potential difficulty of making joint payments, the family court ordered that Wife's portion of the home equity line ($23,743) be deducted from Wife's portion of the retirement accounts, and Husband would

continued . . .

The family court did not consider Husband's fault in awarding the home to Wife, but primarily considered the length of the marriage, Wife's needs, the parties' lifestyle during the marriage, and Husband's ability to pay. The family court did not award the home as an incident of support, but as an asset to be equitably divided, and did not consider the custody or interests of the children because they were emancipated. Further, the family court did not consider speculative tax ramifications related to either the potential sale of the home by Wife or potential early withdrawals from retirement accounts by Husband.

A divided Court of Appeals reversed, with the majority finding the family court abused its discretion by performing an inequitable "in-kind" distribution of dissimilar assets and by failing to consider the tax consequences of Husband's necessary liquidation of his retirement accounts. Wooten, 358 S.C. at 60-64, 594 S.E.2d at 858-60.

Wife argues the Court of Appeals' majority erred in reversing the family court's decision to award the marital home to her in equitably distributing the marital estate by incorrectly applying the standards for awarding a house as an incident of support. Furthermore, the Court of Appeals erred in concluding the division was inequitable or likely to result in tax consequences by forcing Husband to liquidate his retirement accounts to comply with the order. Husband contends the family court erred in failing to consider the tax consequences of its order.

The apportionment of marital property is within the discretion of the family court and will not be disturbed on appeal absent an abuse of discretion. Morris v. Morris, 295 S.C. 37, 39, 367 S.E.2d 24, 24 (1988). In order to effect an equitable apportionment, the family court may require the sale of marital property and a division of the proceeds. Donahue v. Donahue, 299 S.C. 353, 360, 384 S.E.2d 741, 745 (1989). However, the court should

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make all payments on that debt. Thus, Wife actually received $113,652 from Husband's IRA funds while Husband kept $613,830 in those funds.

first try to make an "in-kind" distribution of the marital assets, *i.e.*, award a share of each type of asset to each spouse. Id.

The family court may grant a spouse title to the marital home as part of the equitable distribution because it is not feasible to make an in-kind distribution of the home. Donahue, 299 S.C. at 360, 384 S.E.2d at 745; Brown v. Brown, 279 S.C. 116, 302 S.E.2d 860 (1983) (upholding family court's decision to award marital home to wife as part of equitable distribution of marital property), overruled on other grounds by Tiffault v. Tiffault, 303 S.C. 391, 401 S.E.2d 157 (1991); Josey v. Josey, 291 S.C. 26, 32, 351 S.E.2d 891, 895 (Ct. App. 1986) (reversing family court's decision not to award marital home to wife as part of equitable distribution because family court believed she could not afford it, where wife "love[d] the home dearly," husband did not object to award of house to wife so long as it did not result in increased alimony, and such a disposition under then-existing tax laws would minimize possibility of husband paying capital gains taxes).

The family court should give appropriate weight to the fifteen statutory factors in making an equitable distribution of marital property. S.C. Code Ann. § 20-7-472 (Supp. 2004). Such factors include the income and earning potential of each spouse, the opportunity for future acquisition of capital assets, the physical and emotional health of each spouse, and the desirability to award the family home as part of the equitable distribution. Section 20-7-472(4), (5) and (10).

The family court is required to consider the tax consequences to each party resulting from equitable apportionment. Section 20-7-472(11). However, if the apportionment order does not contemplate the liquidation or sale of an asset, then it is an abuse of discretion for the court to consider the tax consequences from a speculative sale or liquidation. Bowers v. Bowers, 349 S.C. 85, 97-98, 561 S.E.2d 610, 617 (Ct. App. 2002); Ellerbe v. Ellerbe, 323 S.C. 283, 289, 473 S.E.2d 881, 884 (Ct. App. 1996); Graham v. Graham, 301 S.C. 128, 131, 390 S.E.2d 469, 471 (Ct. App. 1990).

Husband relies in part on law relating to the award of exclusive use and possession of the marital home for a defined term as an incident of

support. *E.g.*, Whitfield v. Hanks, 278 S.C. 165, 293 S.E.2d 314 (1982) (discussing possession of residence for specified period as incident of support); Harlan v. Harlan, 300 S.C. 537, 541-42, 389 S.E.2d 165, 168 (Ct. App. 1990) (explaining family court, when awarding marital home for reasonable period as incident of support, must balance competing interests between claim of dependent spouse or children against claim of nonoccupying spouse for his share of marital home; court should consider factors such as need for adequate shelter for minors, suitable housing for handicapped or infirm spouse, and inability of occupying spouse to otherwise obtain adequate housing); Johnson v. Johnson, 285 S.C. 308, 311, 329 S.E.2d 443, 445 (Ct. App. 1985) (same); see also S.C. Code Ann. § 20-7-472(10) (Supp. 2004).

The incident-of-support cases are largely irrelevant in deciding whether the marital home should be awarded to one spouse in the equitable division of marital property. A decision on whether to award the marital home to one spouse for a defined period as an incident of support and a decision on whether to award the home permanently to one spouse in equitable distribution require different analyses. While it is proper for the family court to consider support-related facts in both settings, the lack of a support-related rationale should not necessarily prevent or reduce the likelihood of an award of the marital home to one spouse in equitable distribution.

Instead, as we have done in deciding these appeals, the family court should focus on a fair distribution of the entire marital estate. The family court should consider not only financial factors (including tax consequences, if any) affecting the distribution of the marital home, but also the physical and emotional well-being of each spouse as it relates to the marital home. In other words, decisions relating to the equitable distribution of the marital home should not always be based solely or primarily on a cold, rational calculation of dollars and cents. The family court is free to consider other, less tangible factors asserted by a spouse, weighing those in concert with the financial impact on the parties.

Applying the above principles, we reverse the Court of Appeals and affirm the family court's award of the marital home to Wife for four reasons.

First, the Court of Appeals' majority erred in concluding the family court was required to consider the tax consequences to Husband. The order neither contemplates nor requires, either explicitly or implicitly, the sale of the marital home by Wife or the liquidation of retirement funds by Husband. Such a conclusion is reached only by accepting at face value Husband's assertions he cannot afford to comply with the order and buy himself a home without liquidating his retirement accounts.

Second, the record shows Husband's income and earning potential far exceed Wife's; therefore, Husband's ability to purchase a home and acquire other capital assets in the future is also greater than Wife's.

Third, Wife's emotional attachment to the family home and her wish to keep it in the family in order for future generations to enjoy is a factor to be considered in awarding the home to her, as that likely will benefit her emotional and physical health. In contrast, Husband viewed the disposition of the marital home primarily in financial terms.

Fourth, the record reveals Husband's claims of financial ruin are unfounded. Husband's gross monthly income exceeds $18,000, with a net spendable income exceeding $12,000 per month. We agree with the family court that, accepting Husband's expenses as enumerated in his financial declaration, including the alimony payment, home equity line payment, and a $2,000 mortgage payment to buy his own house, Husband's needs can be met from his income. Moreover, Husband's earning capacity is more than four times that of Wife's, with the potential to be even higher.

We are not persuaded by Husband's implication a total debt of $236,469 resulting from the order is immediately due and payable and thus requires liquidation of his retirement funds. The home equity line which was allocated to Husband includes the $30,000 borrowed for attorney's fees during litigation. The home equity line does not have to be paid in full immediately and was accounted for by the family court as one of Husband's

monthly expenses. Whether Husband's own attorney's fees are immediately payable is unknown. The only debt which is immediately due and payable is $52,917 for Wife's attorney's fees.

The family court properly effected an equitable division of the marital estate and did not abuse its discretion in awarding the marital home to Wife. Additionally, the Court of Appeals remanded the alimony issue because it was closely related to the award of the marital home and recalculation of various expenses would be necessary if Wife did not remain in the marital home. See Wooten, 358 S.C. at 64, 594 S.E.2d at 860. Given our decision upholding the family court's award of the marital home to Wife, further consideration of the amount of alimony award is unnecessary.

II. CREDIT CARD DEBT

Husband vacated the marital home in February 1999. He continued paying the two mortgages and voluntarily gave money to Wife to pay household and child-related expenses until filing an action for separate support and maintenance in June 1999. From June to December 1999, when the pendente lite order required Husband to pay temporary alimony, Husband continued paying the mortgages but did not provide any additional funds to Wife.

Wife incurred a credit card debt of $12,322 from June to December 1999. Wife testified the expenditures were for groceries, dining out, veterinary bills, medications, gasoline, Christmas gifts, and tuition for their son. The record does not contain credit card bills listing the expenses.

The family court treated the credit card debt as marital debt and apportioned it entirely to Husband. The Court of Appeals reversed, holding the credit card debt was not presumed to be a marital debt because it was incurred after the date of commencement of marital litigation. Wife failed to carry her burden of proving the debt was incurred for the benefit of the marriage; therefore, the family court erred in apportioning it as a marital debt. Wooten, 358 S.C. at 59-60, 594 S.E.2d at 857-58.

"Marital property" is defined as "all real and personal property which has been acquired by the parties during the marriage and which is owned as of the date of filing or commencement of marital litigation. . . ." S.C. Code Ann. § 20-7-473 (Supp. 2004). For purposes of equitable distribution, a "marital debt" is a debt incurred for the joint benefit of the parties regardless of whether the parties are legally liable or whether one party is individually liable. Hardy v. Hardy, 311 S.C. 433, 436-37, 429 S.E.2d 811, 813 (Ct. App. 1993).

Marital debt, like marital property, must be specifically identified and apportioned in equitable distribution. Smith v. Smith, 327 S.C. 448, 457, 486 S.E.2d 516, 520 (Ct. App. 1997). In equitably dividing the marital estate, the family court must consider "liens and any other encumbrances upon the marital property, which themselves must be equitably divided, or upon the separate property of either of the parties, and any other existing debts incurred by the parties or either of them during the course of the marriage." S.C. Code Ann. § 20-7-472 (13) (Supp. 2004). This statute creates a rebuttable presumption that a debt of either spouse incurred prior to the beginning of marital litigation is a marital debt and must be factored in the totality of equitable apportionment. Hickum v. Hickum, 320 S.C. 97, 102, 463 S.E.2d 321, 324 (Ct. App. 1995); Hardy, 311 S.C. at 436-37, 429 S.E.2d at 813-14. When the debt is incurred before marital litigation begins, the burden of proving a debt is nonmarital rests upon the party who makes such an assertion. Hickum, 320 S.C. at 103, 463 S.E.2d at 324.

When a debt is incurred after the commencement of litigation but before the final divorce decree, the family court may equitably apportion it as a marital debt when it is shown the debt was incurred for marital purposes, *i.e.*, for the joint benefit of both parties during the marriage. Jenkins v. Jenkins, 345 S.C. 88, 104-05, 545 S.E.2d 531, 540 (Ct. App. 2001) (remanding for family court to determine whether payments or debts incurred by husband after filing of litigation were marital debts); Peirson v. Calhoun, 308 S.C. 246, 252-53, 417 S.E.2d 604, 607-08 (Ct. App. 1992) (finding that a second mortgage and other loans obtained by husband post-separation were marital debts). When a debt is incurred after marital litigation begins, the

burden of proving the debt is marital rests upon the party who makes such an assertion.

Wife argues the Court of Appeals erred because it failed to recognize a marital debt may arise after marital litigation is filed. Wife asserts the credit card debt was incurred for the benefit of both parties during the marriage and should be apportioned to Husband. We disagree.

The Court of Appeals correctly concluded Wife incurred the credit card debt after the marital litigation was filed and the record reveals the debt was not incurred for the joint benefit of the parties during the marriage. Wife failed to carry her burden of proving the credit card debt was a marital debt.[2]

III. LIFE INSURANCE TO SECURE AWARD OF ALIMONY

Husband maintained a $1 million life insurance policy during the marriage, paying an annual premium of $2,220. Although the beneficiary named in the policy was a trust, it was maintained for the benefit of Wife and the children. The family court rejected Wife's request Husband be ordered to maintain the policy, with Wife as the beneficiary, as security for Wife's alimony award. The family court found no "compelling reason" for such a requirement, reasoning Wife was employed in a relatively secure employment with a substantial income and benefits, there were no minor children, and neither Husband nor Wife suffered from any major or debilitating health problems.

The Court of Appeals affirmed, citing its own precedent and holding the family court correctly ruled that a "compelling reason" must exist to warrant the maintenance of life insurance by the payor spouse to secure an

[2] Like the Court of Appeals, we express no opinion on whether the family court could have required Husband to reimburse Wife for some or all of these charges as an incident of support. Wooten, 358 S.C. at 60 n.2, 594 S.E.2d at 858 n.2.

alimony award. The Court of Appeals explained it has required a showing of special circumstances or a compelling reason before requiring the purchase or maintenance of life insurance as security for alimony or child support obligations. Neither the alimony nor child support statutes set forth the requirement of special circumstances or compelling reason, but the Court of Appeals, adhering to its precedent, found the requirement exists in both statutes. Wooten, 356 S.C. at 476-77, 589 S.E.2d at 770-71. The Court of Appeals examined the record in light of the statutory factors and upheld the family court's denial of Wife's request for life insurance to secure the alimony award. Id. at 478, 589 S.E.2d at 771-72.

Wife, relying primarily on Gilfillin v. Gilfillin, 344 S.C. 407, 544 S.E.2d 829 (2001), argues the Court of Appeals erred by grafting the "compelling reason" requirement onto a statute which simply requires an analysis and balancing of statutory factors in deciding whether to secure an alimony award with life insurance. Wife further contends the Court of Appeals erred in upholding the family court's ruling after examining the record in light of the statutory factors.

It is a settled proposition of law that a former wife who is entitled to alimony has an insurable interest in her former husband's life. Shealy v. Shealy, 280 S.C. 494, 497, 313 S.E.2d 48, 50 (Ct. App. 1984). The parties in a divorce proceeding may agree, in a private agreement subsequently merged into the court's order, that a payor spouse shall maintain life insurance to secure an award of alimony or child support. Mitchell v. Mitchell, 283 S.C. 87, 93, 320 S.E.2d 706, 710 (1984); Carnie v. Carnie, 252 S.C. 471, 473, 167 S.E.2d 297, 298 (1969); Lane v. Williamson, 307 S.C. 230, 414 S.E.2d 177 (Ct. App. 1992).

At common law, the obligation to pay periodic alimony ended at death unless a spouse binds his or her estate for the payment of alimony by agreement. McCune v. McCune, 284 S.C. 452, 455, 327 S.E.2d 340, 341 (1985). This Court first approved the use of life insurance as security for a support award in Fender v. Fender, 256 S.C. 399, 182 S.E.2d 755 (1971). In that case, we affirmed a divorce decree requiring the husband to maintain a life insurance policy to assure funds would be available for the college

education of his minor child. We relied on the grant of broad powers contained in the child support statute,[3] finding the only limits are that court-ordered "provisions shall be just and equitable, considered in light of the circumstances of the parties, the nature of the case, and the best interests of the children." Fender, 256 S.C. at 409, 182 S.E.2d at 759; see also Jackson v. Jackson, 264 S.C. 599, 602-03, 216 S.E.2d 530, 531 (1975) (affirming divorce decree which did not require maintenance of life insurance by husband to secure college education of his children because circumstances showed it was not necessary); Brown v. Brown, 270 S.C. 370, 242 S.E.2d 422 (1978) (affirming divorce decree requiring maintenance of life insurance by husband to secure college education of child).

In 1985, the Court of Appeals, relying on Fender and the child support statute, S.C. Code Ann. § 20-3-160 (1985), held the family court has the authority to require a payor spouse to maintain a life insurance policy naming his child as beneficiary, provided the requirement is "based on justice, equity, and compelling reasons for this necessity." Ivey v. Ivey, 286 S.C. 315, 318, 334 S.E.2d 123, 125 (Ct. App. 1985) (finding no compelling reason requiring husband to secure child support with life insurance); see also Sutton v. Sutton, 291 S.C. 401, 353 S.E.2d 884 (Ct. App. 1987) (affirming divorce decree requiring husband to maintain life insurance to secure child support).

In Hardin v. Hardin, 294 S.C. 402, 365 S.E.2d 34 (Ct. App. 1987), the Court of Appeals in a case of first impression concluded the family court required either specific statutory authority or a finding of special circumstances before it could require a payor spouse to purchase life insurance to secure the payment of periodic alimony beyond the payor spouse's death. The family court lacked either form of authority in this instance and, thus, erred in requiring husband to purchase a policy. Id. at 404, 365 S.E.2d at 35-36.

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[3] The language of the present child support statute, S.C. Code Ann. § 20-3-160 (1985), is identical to § 20-115 of the 1962 Code interpreted in Fender.

The Court of Appeals in subsequent cases imposed the requirement of a showing of special circumstances or a compelling reason before a payor spouse could be ordered to secure the payment of alimony or child support with a life insurance policy. Such special circumstances or compelling reasons include major health problems of the payor spouse. Hickman v. Hickman, 294 S.C. 486, 488, 366 S.E.2d 21, 23 (Ct. App. 1988) (finding no special circumstances requiring husband to secure periodic alimony award with life insurance); Shambley v. Shambley, 296 S.C. 405, 408, 373 S.E.2d 689, 690 (Ct. App. 1988) (finding no compelling reason requiring husband to secure child's future support and education expenses with life insurance); Ferguson v. Ferguson, 300 S.C. 1, 5, 386 S.E.2d 267, 269 (Ct. App. 1989) (finding no special circumstances requiring husband to secure periodic alimony award with life insurance); Harlan v. Harlan, 300 S.C. 537, 540, 389 S.E.2d 165, 167 (Ct. App. 1990) (finding no compelling reason requiring husband to secure child support with life insurance).

In 1990, the Legislature amended S.C. Code Ann. § 20-3-130 (Supp. 2004) to codify the common law rule that periodic alimony terminates at death, but provided an exception to this rule when alimony is secured pursuant to subsection 20-3-130(D). Gilfillin, 344 S.C. at 412, 544 S.E.2d at 831.

Section 20-3-130 now provides, in pertinent part:

> (B) 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. . . .

> (D) In making an award of alimony or separate maintenance and support, the court may make provision for security for the payment of the support including, but not limited to, requiring the posting of money, property, and bonds and may require a spouse, with due consideration of the cost of premiums, insurance plans carried by the parties during marriage, insurability of the payor spouse, the probable economic condition of the supported spouse upon the death of the payor spouse, and any other factors the court may deem relevant, to carry and maintain life insurance so as to assure support of a spouse beyond the death of the payor spouse.

In Gilfillin, we stated subsection (D) must be strictly construed because it is in derogation of the common law rule that periodic alimony terminates at the death of the payor spouse. We held that life insurance is the only permitted means of securing alimony beyond the life of the payor spouse and struck down the family court's creation of an alimony trust. We stated that "[w]ith the enactment of subsection 20-3-130(D), the Legislature provided that life insurance could be used to secure such payment whenever the family court made factual findings concerning the five factors favored requiring such insurance." Gilfillin, 344 S.C. at 414, 544 S.E.2d at 832. Further, the "use of life insurance is restricted in subsection (D) for use only after the family court makes comprehensive review of five distinct issues. . . ." Id. We noted several of the pre-1990 Court of Appeals' cases listed above which require a finding of "special circumstances," but did not explicitly endorse or reject such a requirement.[4]

[4] Justice Moore, dissenting, appeared to endorse the requirement of "special circumstances" to secure an alimony award. See Gilfillin, 344 S.C. at 416 n.1, 544 S.E.2d at 833 n.1 (Hardin and cases following it "do not prohibit ordering life insurance to secure alimony if there are special circumstances or statutory authority").

Since 1990, the Court of Appeals has continued to require a showing of "special circumstances" or a "compelling reason" before the family court may order the purchase or maintenance of life insurance as security for an alimony or child support obligation. Wooten, 356 S.C. at 477, 589 S.E.2d at 771 ("precedent of this court, both before and after 1990, has consistently applied the 'compelling reason' standard to secure the payment of alimony and child support"); Mallett v. Mallett, 323 S.C. 141, 150, 473 S.E.2d 804, 810 (Ct. App. 1996) (finding no compelling reason requiring husband to secure child support award with life insurance); McElveen v. McElveen, 332 S.C. 583, 603-04, 506 S.E.2d 1, 11-12 (Ct. App. 1998) (finding no compelling reason requiring husband to secure child support and alimony payments with life insurance); Allen v. Allen, 347 S.C. 177, 186-87, 554 S.E.2d 421, 426 (Ct. App. 2001) (remanding for family court to reconsider decision requiring husband to secure alimony award with life insurance by making a comprehensive review of statutory factors, and mentioning precedent requiring a showing of special circumstances for such security); Roberson v. Roberson, 359 S.C. 384, 391-92, 597 S.E.2d 840, 844 (Ct. App. 2004) (upholding ruling which required husband to secure alimony award with life insurance where record revealed family court properly considered statutory factors; Court of Appeals cited Wooten, 356 S.C. 473, 589 S.E.2d 769, which requires showing of special circumstances or compelling reason). See also John J. Michalik, Divorce: Provision in Decree That One Party Obtain or Maintain Life Insurance for Benefit of Other Party or Child, 59 A.L.R.3d 9 (1974).

We conclude, in clarifying Gilfillin, the family court must conduct a comprehensive review of the statutory factors to determine whether special circumstances exist which require the purchase or maintenance of a life insurance policy to secure an alimony award. Although the term "special circumstances" is not found in the statute, the Legislature was aware of prior case law on this issue when it enacted subsection 20-3-130(D), which indicates the Legislature anticipated the provision would be applied in light of existing precedent. See State v. Bridgers, 329 S.C. 11, 14, 495 S.E.2d 196, 197 (1997) (Legislature is presumed to be aware of common law when enacting statutes and using terms that have a well-recognized meaning in the law); Berkebile v. Outen, 311 S.C. 50, 53, 426 S.E.2d 760, 762 (1993) (basic

presumption exists that the Legislature has knowledge of previous legislation when later statutes are passed on a related subject).

However, we disapprove of the requirement of a showing of a "compelling reason" before life insurance may be ordered to secure an alimony award. While the difference between "special circumstances" and a "compelling reason" may appear semantic, use of the latter term arguably places a higher burden on the spouse requesting security. We also reject the conclusion a "court-mandated requirement for life insurance to secure the alimony payments is the exception, not the rule." Wooten, 356 S.C. at 478, 589 S.E.2d at 772.

The Court of Appeals' requirement of a "compelling reason," combined with its view that court-mandated life insurance is the exception, not the rule, effectively established a presumption against ordering life insurance to secure an alimony award. The Legislature did not intend to establish a presumption in favor of or against such security under the statute. Instead, as we indicated in Gilfillin, the statute contemplates a comprehensive review of the factors set out in subsection 20-3-130(D). If that review reveals the existence of special circumstances in which the supported spouse establishes the need for the security and the payor spouse is capable of providing it, the family court may order the award be secured with life insurance.

In making such a determination, the analysis should begin with the supported spouse's need for such security, *i.e.*, consideration of the supported spouse's probable economic condition in the event of the payor spouse's death. The family court should consider the supported spouse's age, health, income earning ability, and accumulated assets. If a need for security is found, the family court should next consider the payor spouse's ability to secure the award with life insurance, *i.e.*, the payor spouse's age, health, income earning ability, accumulated assets, insurability, cost of premiums, and insurance plans carried by the parties during the marriage. The cost of

premiums could be assigned solely to the payor spouse, solely to the payee spouse, or shared between them.[5]

In the instant case, Wife is in good health, has a stable income and substantial assets with which she may support herself should Husband predecease her and alimony payments cease. Husband can afford the premiums, carried the policy during the marriage, and apparently is in good health and insurable. We do not find the existence of special circumstances giving rise to a need for security in this case. We affirm the family court and Court of Appeals' application of the statutory factors to find Husband was not required to purchase life insurance to secure Wife's alimony award.[6]

IV. WIFE'S ATTORNEY'S FEES

Husband argues he should not be required to pay Wife's attorneys' fees because the Court of Appeals reversed the family court's ruling in favor of Wife on the main issues in dispute, the distribution of the marital home and the credit card debt. Our resolution of these appeals largely nullifies Husband's argument. We affirm. See Glasscock v. Glasscock, 304 S.C. 158, 403 S.E.2d 313 (1991) (listing factors to consider in awarding attorney's fees, including beneficial results obtained).

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[5] Alimony payments terminate "on the remarriage or continued cohabitation of the supported spouse or upon the death of either spouse" and are "terminable and modifiable based upon changed circumstances occurring in the future." Section 20-3-130(B)(1). A requirement that an alimony award be secured with life insurance is similarly terminable and modifiable.

[6] Some of the cited Court of Appeals' opinions addressed the issue of securing a child support obligation with life insurance. Our decision today addresses only the securing of an alimony award with life insurance as provided by statute. We express no opinion on the analysis established by the Court of Appeals in the securing of a child support award.

CONCLUSION

We reverse the Court of Appeals and award the marital home to Wife in the equitable division of the marital estate. We affirm the Court of Appeals and conclude Wife's credit card debt was not a marital debt. We reverse the Court of Appeals' requirement the family court find a "compelling reason" before requiring a spouse to secure an alimony award with life insurance, but affirm the conclusion Husband is not required to secure Wife's alimony award with life insurance. We affirm the Court of Appeals and require Husband to pay Wife's attorney's fees in the amount of $52,917. The designation of the credit card debt as nonmarital increases the size of the marital estate by $12,322 and affects the equitable distribution of Husband's IRA funds. We remand this case to the family court for reconsideration of that issue in a manner consistent with this opinion.

AFFIRMED IN PART; REVERSED IN PART.

TOAL, C.J., MOORE, WALLER and PLEICONES, JJ., concur.

THE STATE OF SOUTH CAROLINA
In The Supreme Court

In the Matter of Harry E. Bodiford, Respondent.

Opinion No. 25992
Submitted May 6, 2005 – Filed June 6, 2005

DEFINITE SUSPENSION

Henry B. Richardson, Jr., Disciplinary Counsel, and C. Tex Davis, Jr., Assistant Disciplinary Counsel, both of Columbia, for the Office of Disciplinary Counsel.

Harry E. Bodiford, of Clemson, pro se.

PER CURIAM: In this attorney disciplinary matter, respondent and the Office of Disciplinary Counsel (ODC) have entered into an Agreement for Discipline by Consent (Agreement) pursuant to Rule 21, RLDE, Rule 413, SCACR. In the Agreement, respondent admits misconduct and consents to a public reprimand or a definite suspension not to exceed sixty (60) days. See Rule 7(b), RLDE, Rule 413, SCACR. We accept the Agreement and definitely suspend respondent from the practice of law in this state for a thirty (30) day period. The facts, as set forth in the Agreement, are as follows.

FACTS

Effective February 3, 2004, respondent was suspended from the practice of law for failure to comply with Mandatory Continuing Legal Education (MCLE) requirements. In addition, respondent failed to pay his South Carolina Bar license fee. Subsequent to the notice of his suspension from the Commission on Continuing Legal Education and Specialization, respondent negotiated a settlement in an ongoing domestic matter with opposing counsel. Respondent's suspension was not lifted and respondent was not reinstated to the practice of law until March 31, 2004.

Respondent timely responded to ODC and has cooperated with ODC throughout these proceedings.

LAW

Respondent admits that by his misconduct he has violated the following provisions of the Rules of Professional Conduct, Rule 407, SCACR: Rule 8.4(a) (lawyer shall not violate Rules of Professional Conduct); Rule 8.4(d) (lawyer shall not engage in conduct involving dishonesty, fraud, deceit, or misrepresentation); and Rule 8.4(e) (lawyer shall not engage in conduct that is prejudicial to administration of justice). Respondent further admits his misconduct constitutes a violation of Rule 7, RLDE, of Rule 413, SCACR, specifically Rule 7(a)(1) (lawyer shall not violate Rules of Professional Conduct or any other rules of this jurisdiction regarding professional conduct of lawyers) and Rule 7(a)(5) (lawyer shall not engage in conduct tending to pollute the administration of justice or to bring the courts or the legal profession into disrepute or conduct demonstrating an unfitness to practice law).

CONCLUSION

We accept the Agreement and definitely suspend respondent from the practice of law for a thirty (30) day period.[1] Within fifteen days of the date of this opinion, respondent shall file an affidavit with the Clerk of Court showing that he has complied with Rule 30, RLDE, Rule 413, SCACR.

DEFINITE SUSPENSION.

TOAL, C.J., MOORE, WALLER, BURNETT and PLEICONES, JJ., concur.

[1] ODC's request for appointment of an attorney to protect respondent's clients' interests is denied.

IN THE STATE OF SOUTH CAROLINA
In The Supreme Court

In the Matter of Theo W. Mitchell, Respondent.

Opinion No. 25993
Submitted May 6, 2005 – Filed June 6, 2005

PUBLIC REPRIMAND

Henry B. Richardson, Jr., Disciplinary Counsel, and Barbara M. Seymour, Senior Assistant Disciplinary Counsel, both of Columbia, for the Office of Disciplinary Counsel.

Theo W. Mitchell, of Greenville, pro se.

PER CURIAM: The Office of Disciplinary Counsel (ODC) and respondent have entered into an Agreement for Discipline by Consent pursuant to Rule 21, RLDE, Rule 413, SCACR, in which respondent admits misconduct and agrees to either an admonition or a public reprimand. We accept the agreement and issue a public reprimand. The facts, as set forth in the agreement, are as follows.

FACTS

Respondent operates a solo practice in Greenville. Respondent employs Anthony Kinsey, a lawyer not licensed to practice law in South Carolina. On June 18, 2004, the Commission on Lawyer Conduct issued a letter of caution to respondent advising him that his reference to Mr. Kinsey as an attorney in communications was

misleading. The letter of caution also advised respondent that his use of the firm name "Theo Mitchell & Associates" and his reference to "attorneys and counselors at law" in his communications was misleading if there were no associates or attorneys in his employ. The letter of caution also advised respondent that he should be more careful to adhere to the guidelines set forth in Rules 7.1, 7.5(a), and 7.5(d) of the Rules of Professional Conduct, Rule 407, SCACR.

After receiving the letter of caution, respondent continued to use the word "associates" in his firm name and to refer to "attorneys and counselors at law" on his letterhead even though he employed no licensed attorneys other than himself. It was not until receipt of the Notice of Full Investigation in this current matter that respondent discontinued the use of "Theo Mitchell & Associates, Attorneys and Counselors at Law" in his communications.

Respondent now acknowledges that his continued use of the term "associates" and the phrase "attorneys and counselors at law" could have misled clients about Mr. Kinsey and other staff members' status in the law firm.

LAW

Respondent admits that he has violated the following provisions of the Rules of Professional Conduct, Rule 407, SCACR: Rule 7.1 (lawyer shall not make false, misleading, deceptive or unfair communications about the lawyer or his services); Rule 7.5(a) (lawyer shall not use a firm name, letterhead, or other professional designation that violates Rule 7.1) and Rule 7.5(d) (lawyer may state or imply he practices in a partnership or other organization only when that is the fact). Respondent acknowledges that his misconduct constitutes grounds for discipline under the Rules for Lawyer Disciplinary Enforcement, Rule 413, SCACR, specifically Rule 7(a)(1) (it shall be ground for discipline for lawyer to violate Rules of Professional Conduct).

CONCLUSION

We find that respondent's misconduct warrants a public reprimand. Accordingly, we accept the Agreement for Discipline by Consent and publicly reprimand respondent for his misconduct.

PUBLIC REPRIMAND.

TOAL, C.J., MOORE, WALLER, BURNETT and PLEICONES, JJ., concur.

THE STATE OF SOUTH CAROLINA
In The Supreme Court

Jack L. Hinton, Jr., Respondent,

v.

South Carolina Department of Probation, Parole and Pardon Services, Petitioner.

ON WRIT OF CERTIORARI TO THE COURT OF APPEALS

Appeal From Greenville County
Charles B. Simmons, Jr., Circuit Court Judge

Opinion No. 25994
Heard May 5, 2005 – Filed June 6, 2005

DISMISSED AS IMPROVIDENTLY GRANTED

Deputy Director Teresa A. Knox, Legal Counsel J. Benjamin Aplin, Legal Counsel Lovee McKinney Watts, all of South Carolina Department of Probation, Pardon and Parole, of Columbia, for Petitioner.

William M. Hagood, III, Love, Thornton, Arnold & Thomason, of Greenville, for Respondent.

PER CURIAM: We granted a writ of certiorari to review the Court of Appeals' opinion in Hinton v. S.C. Dep't of Probation, Parole, and Pardon Servs., 357 S.C. 327, 592 S.E.2d 335 (Ct. App. 2004). We now dismiss the writ as improvidently granted.

DISMISSED AS IMPROVIDENTLY GRANTED.

TOAL, C.J., MOORE, WALLER, BURNETT and PLEICONES, JJ., concur.

THE STATE OF SOUTH CAROLINA
In The Supreme Court

JRS Builders, Inc., Respondent,

v.

Henry G. Neunsinger, Judy Timms, and Atlantic Savings Bank, FSB, Defendants,

Of Whom Henry G. Neunsinger is Appellant.

Appeal From Berkeley County
John B. Williams, Circuit Court Judge

Opinion No. 25995
Heard June 10, 2004 – Filed June 6, 2005

AFFIRMED IN PART, REVERSED IN PART

Mary Leigh Arnold, of Mt. Pleasant, for appellant.

Steven L. Smith and Wm. Mark Koontz, of Smith, Collins & Newton, P.A., of North Charleston, for respondent.

JUSTICE MOORE: After a final judgment in favor of respondent (Builder) in its mechanic's lien action against petitioner (Homeowner), the master-in-equity awarded attorney's fees to Builder as the prevailing party. After certifying this case from the Court of Appeals pursuant to Rule 204(b), SCACR, we affirm in part and reverse in part.

FACTS

On October 30, 1998, Builder brought an action against Homeowner pursuant to the Mechanic's Lien Statute, S.C. Code Ann. § 29-5-10 (1991). Builder asserted he was owed $74,500 for work performed in the construction of a home for Homeowner. Homeowner counterclaimed alleging causes of action for breach of contract, negligent construction, and breach of warranty. Homeowner's counterclaims sought an unspecified amount in actual and punitive damages.

After hearing the case, the master found Builder was entitled to $65,048 for breach of contract and that Homeowner established he was entitled to $36,907.26 on his counterclaim. The final result was judgment for Builder in the amount of $28,140.76. Attorney's fees and costs were not awarded to either party. Homeowner and Builder then filed motions for an award of attorney's fees on the ground that each was the prevailing party under S.C. Code Ann. § 29-5-10(b) (providing method for award of attorney's fees for prevailing party in action to foreclose mechanic's lien).[1]

The master filed an amended order. In this order, the award to Homeowner was increased to $44,430.86 and final judgment for Builder was entered in the amount of $20,617.14. Further, the master summarily found the amended version of § 29-5-10, although enacted after the institution of Builder's action, applied and awarded attorney's fees to Builder as the prevailing party. The amount of attorney's fees was $29,033.75.

[1]In 1999, § 29-5-10(b) was amended. As will be discussed *infra*, Homeowner argues the former statute applies while Builder argues the amended statute applies.

ISSUE

> Did the trial court err by finding Builder to be the prevailing party who was entitled to attorney's fees pursuant to the amended version of S.C. Code Ann. § 29-5-10 (Supp. 2003)?

DISCUSSION

Homeowner contends the pre-1999 version of § 29-5-10 should apply when determining who is the prevailing party for the purpose of awarding attorney's fees. Builder contends the amended version of § 29-5-10 should be applied retroactively.

The prior version of the statute, S.C. Code Ann. § 29-5-10 (a) (1991), establishes that the prevailing party to an action to foreclose a mechanic's lien shall be awarded attorney's fees and costs up to the amount of the actual lien awarded. Subsection (b) of the statute prescribes the method used for determining who is the prevailing party, and states, in pertinent part:

> If the plaintiff makes no written offer of settlement, the amount prayed for in his complaint is considered to be his final offer of settlement for purposes of this section.
>
> If the defendant makes no written offer of settlement, his offer of settlement is considered to be zero.

S.C. Code Ann. § 29-5-10 (b).

In 1997, this Court specifically interpreted the 1991 statute and held the following:

> when neither party makes a written offer of settlement, the plaintiff's offer is considered the amount prayed for in its complaint and the defendant's offer is considered to be *zero*.

> Whether fairly or unfairly, the statute does not make provision for considering counterclaims as negative offers of settlement.

Brasington Tile Co., Inc. v. Worley, 327 S.C. 280, 289, 491 S.E.2d 244, 248 (1997) (emphasis in original).

In response to the Brasington decision, the legislature amended the statute, effective June 11, 1999—nearly eight months *after* the underlying lawsuit was filed. The amended version provides, in pertinent part, the following:

> If the defendant makes no written offer of settlement, the value of his counterclaim is considered to be his negative offer of settlement. If the defendant has not asserted a counterclaim, his offer of settlement is considered to be zero.

S.C. Code Ann. § 29-5-10 (b) (Supp. 2003). Application of the amended statute to the facts in Brasington would change the outcome of that case. In other words, if the amended statute were to apply retroactively, the Brasington decision would, in effect, be overruled.

Because the legislature does not have the authority to overrule a decision by this Court, the amended statute cannot apply retrospectively. *See* Steinke v. South Carolina Dep't of Labor, Licensing and Regulation, 336 S.C. 373, 520 S.E.2d 142 (1999) (holding legislature lacked authority to retroactively overrule Court's interpretation of a statute). Moreover, we have found that "a judicial interpret[ation] of a statute is determinative of its meaning and effect, and any subsequent legislative amendment to the contrary will only be effective from the date of its enactment and cannot be applied retroactively." Lindsay v. Nat'l Old Line Ins. Co., 262 S.C. 621, 629, 207 S.E.2d 75, 78 (1974). Because a prior, on-point judicial decision has been rendered, any subsequent statutory amendments apply prospectively

only. To decide otherwise would allow the legislature, in effect, to overrule judicial decisions in violation of the separation of powers doctrine.[2]

In the present case, the question of who is the prevailing party is controlled by S.C. Code Ann. § 29-5-10 (1991) and this Court's interpretation of that statute in Brasington. Homeowner is correct in asserting that under the prior version of the statute, he would be the prevailing party. Neither party made a written offer of settlement. Final judgment was entered for Builder in the amount of $20,617.14. Applying the formula in the applicable statute and this Court's interpretation of that statute in Brasington, Builder's settlement offer is the amount prayed for in the complaint, which was $74,500, and Homeowner's settlement offer is zero. Zero is closer to $20,617.14 than $74,500. Accordingly, Homeowner should have been deemed the prevailing party and the party entitled to attorney's fees and costs.

CONCLUSION

We reverse the master's decision finding Builder entitled to attorney's fees as the prevailing party under amended § 29-5-10. Applying the former version of § 29-5-10, we find Homeowner is entitled to attorney's fees as the prevailing party in the mechanic's lien action. Appellant's second issue is affirmed pursuant to Rule 220(b)(1), SCACR, and the following authority: South Carolina Nat'l Bank, Greenville v. Hammond, 260 S.C. 622, 198

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[2]The dissent states the Lindsay analysis should be abandoned because the legislature has plenary power to amend statutes and, as such, this Court should not limit the legislature's authority to decide whether a statutory amendment should be given retroactive effect. However, while the legislature has plenary power to amend statutes, the construction of a statute is a judicial function and responsibility. *See* Lindsay v. Nat'l Old Line Ins. Co., 262 S.C. 621, 207 S.E.2d 75 (1974); Boatwright v. McElmurray, 247 S.C. 199, 146 S.E.2d 716 (1966). Therefore, once this Court has construed a particular statute, the legislature cannot thereafter amend the statute to alter our construction of the statute and have the amendment apply retroactively. To do so is to invade upon judicial power.

S.E.2d 123 (1973) (as general rule, it is essential to establishment of set off that claims or debts be mutual, *i.e.*, they must subsist or be owing, between same parties in same right or capacity, and must be of same kind or quality). Therefore, the master's decision is
AFFIRMED IN PART, REVERSED IN PART.

TOAL, C.J., WALLER, BURNETT, JJ., concur. PLEICONES, J., dissenting in a separate opinion.

JUSTICE PLEICONES: In 1974, the Court held that the General Assembly could not, consonant with the separation of powers doctrine, enact a statute in order to overturn the result in a case we had already decided. Lindsay v. Nat'l Old Line Ins. Co., 262 S.C. 621, 207 S.E.2d 75 (1974). In other words, the legislature cannot, by legislative enactment, overrule our interpretation of a statute. Boatwright v. McElmurray, 247 S.C. 199, 146 S.E.2d 716 (1966). Over the past several years, Lindsay has been construed as a limitation on the General Assembly's authority to amend a statute, and to have that amendment apply retroactively.[3] While I have joined several of these decisions, I have come to believe that this reading of Lindsay, which held only that the General Assembly could not legislatively reverse the Court's decision, is overly broad. See Rivers v. Roadway Express, 511 U.S. 298, 114 S.Ct. 1510, 128 L.Ed.2d 274 (1994)("Congress, of course, has the power to amend a statute that it believes we have misconstrued. It may even, within broad constitutional bounds, make such a change retroactive and thereby undo what it perceives to be the undesirable past consequences of a misinterpretation of its work product").

Whether a statutory amendment applies retroactively is ordinarily a matter of statutory construction and interpretation, not of constitutional law. The General Assembly has the authority to amend statutes, and to determine whether the amended statute applies to matters occurring before its effective date. The general rule is that "statutory enactments are to be considered prospective rather than retroactive unless there is a specific provision in the enactment or clear legislative intent to the contrary. [citation omitted]. However, statutes which are remedial or procedural in nature are generally held to operate retrospectively." South Carolina Dep't of Rev. v. Rosemary Coin Machines, Inc., 339 S.C. 25, 528 S.E.2d 416 (2000). The only

[3] See Simmons v. Greenville Hosp. Sys., 355 S.C. 581, 586 S.E.2d 569 (2003); Williamson v. South Carolina Ins. Reserve Fund, 355 S.C. 420, 586 S.E.2d 115 (2003); Dykema v. Carolina Emerg. Physicians, P.C., 348 S.C. 549, 560 S.E.2d 892 (2002); Pike v. South Carolina Dep't of Trans., 343 S.C. 224, 540 S.E.2d 87 (2000); Steinke v. South Carolina Dep't of Labor, Licensing, and Reg., 336 S.C. 373, 520 S.E.2d 142 (1999); see also Tilley v. Pacesetter Corp., 355 S.C. 361, 585 S.E.2d 292 (2003).

constitutional limit on retroactivity in a civil context[4] derives from due process guarantees, and from S.C. Const. art. I, § 4, prohibiting the passage of a law that "has the effect of impairing the obligation of contract or divesting vested rights of property." E.g., Schumacher v. Chapin, 228 S.C. 77, 88 S.E.2d 874 (1955).

Through a series of cases citing Lindsay, we have created two different rules regarding statutory retroactivity: If the Court never interpreted the prior statute, then the general rule recited above applies. If, however, the Court has issued an opinion interpreting a statute, any legislative change to that statute is deemed prospective only, lest the legislature invade the province of the Court. In my opinion, this "Lindsay rule," premised on the separation of powers doctrine, has in fact led to its violation.

The separation of powers doctrine prevents one branch of government from usurping the power and authority of another. Knotts v. South Carolina Dep't of Natural Resources, 348 S.C. 1, 558 S.E.2d 511 (2002). It is not the legislature's amendment of a statute in response to a judicial interpretation which offends the doctrine, but rather our limitation on the General Assembly's authority to decide whether that statutory change should be given retroactive effect. As we held in Boatwright, "the legislature has plenary power to amend statutes."

In my opinion, we should use this opportunity to abandon our Lindsay retroactivity jurisprudence and return to the general rules of statutory construction. In this case, however, we need not decide whether the amendment to S.C. Code Ann. § 29-5-10 was procedural or remedial and thus should be given retroactive effect. In 1883, this Court established the rule that entitlement to costs is to be determined by the statute in effect at the time the suit is decided and the costs, if any, are to be awarded. Irwin v. Brooks, 19 S.C. 96 (1883). I would hold that, in the absence of legislative intent to the contrary, entitlement to statutory attorneys fees should be determined pursuant to the statute in effect at the time the final judgment is entered. Id. I would therefore affirm the master's award of attorney's fees to respondent.

[4] There are, of course, *ex post facto* concerns with criminal statutes.

I therefore respectfully dissent.

THE STATE OF SOUTH CAROLINA
In The Supreme Court

Bryan Bowman, Claimant,

v.

State Roofing Company, Chesterfield County School District, George Cantlon, Uninsured Employers' Fund, Travelers Insurance Co., AFCO Credit Corporation, and C. Douglas Wilson & Co. Inc.,

Of whom State Roofing Company and Uninsured Employers' Fund are Respondents,

and Travelers Insurance Co. and AFCO Credit Corporation are, Appellants.

Danny Gainey, Claimant,

v.

State Roofing Company, Chesterfield County School District, George Cantlon, Uninsured Employers' Fund, Travelers Insurance Co., AFCO Credit Corporation, and C. Douglas Wilson & Co. Inc.,

Of whom State Roofing Company and Uninsured Employers' Fund are Respondents,

and Travelers Insurance Co. and
AFCO Credit Corporation are, Appellants.

Appeal from Sumter County
Thomas W. Cooper, Jr., Circuit Court Judge

Opinion No. 25996
Heard February 2, 2005 – Filed June 6, 2005

AFFIRMED AS MODIFIED

C. Mitchell Brown, Elizabeth Herlong Campbell, and Beth Burke Richardson, of Nelson Mullins Riley & Scarborough, LLP, of Columbia; and Erroll Anne Y. Hodges, of Nelson Mullins Riley & Scarborough, LLP, of Greenville, for appellant AFCO Credit Corporation.

Byron P. Roberts, of Tally, Roberts & Blue, LLC, of Columbia, for appellant Travelers Insurance Co.
David C. Holler, of Lee, Erter, Wilson, James, Holler & Smith, L.L.C., of Sumter, for respondent Employer Company.

Ajerenal Danley and Matthew C. Robertson, of Danley Law Firm, P.C., of Columbia, for respondent Uninsured Employers' Fund.

JUSTICE MOORE: Claimants Bowman and Gainey commenced these workers' compensation claims alleging on-the-job injuries sustained on June 3 and September 15, 1998, while working for respondent State Roofing

Company (Employer). Employer's workers' compensation insurance carrier, appellant Travelers Insurance Company (Carrier), denied coverage on both claims asserting Employer's policy had been cancelled effective before either claim arose. The two claims came before the single commissioner solely on the issue of coverage. The commissioner found the policy was not effectively cancelled and ordered Carrier to appear and defend the claims on behalf of Employer. The full Commission affirmed, as did the circuit court. We affirm as modified.

FACTS

Employer purchased a workers' compensation insurance policy from Carrier with coverage for one year from November 8, 1997. On November 20, Employer signed a finance agreement with appellant/respondent AFCO Credit Corporation (Finance Company) whereby Finance Company agreed to finance the annual premium of $4,616 for Employer's workers' compensation insurance. In exchange, Employer agreed to repay Finance Company in nine monthly installments. Under this agreement, Finance Company was authorized to cancel the insurance policy if Employer did not comply with the terms of the finance agreement. On December 16, Finance Company paid the entire annual premium to Carrier.

Employer missed its first installment payment to Finance Company which was due January 8, 1998. On January 20, Finance Company mailed Employer a Notice of Intent advising that if the payment and a late charge were not received within ten days, the policy would be cancelled. On February 5, Finance Company issued a Notice of Cancellation (NOC) requesting that Carrier cancel the policy effective February 13. A copy of the NOC was sent to Employer.

Finance Company did not receive Employer's January installment until February 13 when the February installment was already due. Finance Company advised Employer that its account was still delinquent. Employer continued sending payments late and its account was not current until June 1998. On June 24, Finance Company sent to Carrier a Request for Reinstatement. After the June payment, Employer made no more payments to Finance Company. On July 20, Finance Company sent a second Notice of

Intent followed by an NOC on August 6 requesting cancellation effective August 14.

It is undisputed that Carrier never refunded any unearned premium to either Finance Company or Employer.

ISSUES

1. Does the capitulation agreement signed by Employer resolve the issue of coverage?

2. Does noncompliance with statutory requirements render the cancellation ineffective?

DISCUSSION

1. Capitulation agreement

Appellants (Carrier and Finance Company) contend the Workers' Compensation Commission has no jurisdiction because Employer signed a capitulation agreement acknowledging non-compliance with workers' compensation insurance requirements from March 1998 to February 1999. This agreement was negotiated by the Commission's Director of Coverage and Compliance after the Commission received from Carrier a notice that Employer's coverage had been cancelled. The validity of the cancellation was not investigated for purposes of this agreement, however, and Employer remained adamant that it had coverage. According to testimony by the Director of Coverage and Compliance, the point of the agreement was an admission that Employer was unable to demonstrate compliance. After signing the agreement, Employer paid a fine for non-compliance with workers' compensation insurance requirements.

The agreement in question specifically states: "It is understood and agreed by signing this Agreement [Employer] does not make any admissions or waive any claims or causes of action [Employer] may have against any third party, insurance company, agent or broker." Under the limited terms of

this agreement, the commissioner properly found Employer did not waive its claim that Carrier's cancellation of the policy was invalid.

2. Cancellation of the policy

The cancellation of insurance by Finance Company is governed by S.C. Code Ann. § 38-39-90 (2002)[1] which provides:

> **§ 38-39-90. Cancellation of insurance contracts by premium service company.**
>
> (a) When a premium service agreement contains a power of attorney enabling the company to cancel any insurance contract listed in the agreement, the insurance contract may not be canceled by the premium service company unless the cancellation is effectuated in accordance with this section.
>
> (b) The premium service company shall deliver the insured at least ten days' written notice of its intent to cancel the insurance contract unless the default is cured within the ten-day period.
>
> (c) Not less than five days after the expiration of the notice, the premium service company may thereafter request in the name of the insured cancellation of the insurance contract by delivering to the insurer a notice of cancellation. The insurance contract must be canceled as if the notice of cancellation had been submitted by the insured himself, but without requiring the return of the insurance contract. The premium service company shall also deliver a notice of cancellation to the insured at his last address as set forth in its records by the date the notice of cancellation is delivered to the insurer. It is sufficient to give notice either by delivering it to the person or by depositing it in the United States mail, postage prepaid, addressed to the last

[1]This section was subsequently amended.

address of the person. Notice delivered in accordance with the provisions of this statute shall be sufficient proof of delivery.

(d) All statutory, regulatory, and contractual restrictions providing that the insurance contract may not be canceled unless notice is given to a governmental agency, mortgagee, or other third party apply where cancellation is effected under this section. The insurer shall give the prescribed notice in behalf of itself or the insured to any governmental agency, mortgagee, or other third party by the second business day after the day it receives the notice of cancellation from the premium service company and shall determine the effective date of cancellation taking into consideration the number of days' notice required to complete the cancellation.

(e) Whenever an insurance contract is canceled, the insurer shall return whatever gross unearned premiums are due under the insurance contract to the premium service company which financed the premium for the account of the insured. The gross unearned premiums due on personal lines insurance contracts financed by premium service companies must be computed on a pro rata basis.

(f) If the crediting of return premiums to the account of the insured results in a surplus over the amount due from the insured, the premium service company shall promptly refund the excess to the insured or the agent of record. No refund is required if it amounts to less than three dollars.

(g) Cancellations of insurance contracts by premium service companies must be effected exclusively by the forms, method, and timing set forth in this chapter.

(emphasis added).

The commissioner ruled that Carrier's cancellation was invalid under this section because (1) the notices of cancellation sent by Finance Company

to Carrier requesting cancellation did not properly give ten days' notice to Employer; and (2) Carrier failed to refund unearned premiums with notice to Employer. Appellants contend this was error.

a. Notices of Cancellation

The commissioner ruled that the both the February 5 and August 6 Notices of Cancellation (NOC) failed to give the required ten days' notice to Employer before cancellation.

The NOC mailed on February 5 indicated a cancellation date of February 13, less than ten days from the date of the NOC's mailing.[2] The commissioner also applied Regulation 69-10(22) and ruled that the ten-day notice period does not begin to run until the second business day following receipt of the NOC by Carrier; therefore cancellation could not have been effective until February 18. The commissioner concluded Finance Company's February 5 request for cancellation was therefore invalid. Similarly, the August 6 NOC indicated a cancellation date of August 14, less than ten days from the date of mailing. Again applying Regulation 69-10(19), the commissioner concluded cancellation could not be effective until August 19 and therefore the August 6 NOC was invalid.

Appellants contend the commissioner incorrectly calculated the ten-day period required by § 38-39-90. We agree.

The timeline under § 38-39-90 indicates the premium service company must first deliver[3] to the insured a Notice of Intent indicating its intent to cancel the insurance policy in ten days. § 38-39-90(b). Five days after this ten-day period expires, the premium service company may deliver an NOC to the insurance carrier requesting that the policy be cancelled. The premium service company must also send to the insured on the same date a copy of the NOC. § 38-39-90(c).

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[2]Under § 38-39-90(c), the date of delivery is the date of mailing.

[3]As noted above, the date of delivery is the date of mailing under § 38-39-90(c).

Under this statute, the ten-day notice to the insured is calculated from the date of mailing of the Notice of Intent, not the date of mailing the NOC as found by the commissioner. Cancellation may therefore be effected a total of fifteen days from the mailing of the Notice of Intent. *See* Hiott v. Guar. Nat. Ins. Co., 329 S.C. 522, 496 S.E.2d 417 (Ct. App. 1997) (under § 38-39-90, cancellation must be at least fifteen days from mailing notice of intent).

Applying this timeline to the facts here, the February 5 NOC properly gave notice to Employer that the policy cancellation could be effected as of February 13, which was more than fifteen days after the date of mailing the Notice of Intent on January 20. Similarly, the August 6 NOC properly gave notice that the policy could be cancelled as of August 14, which was more than fifteen days from the date the Notice of Intent was mailed on July 20. The commissioner erred in calculating the required ten days' notice by using the date the NOC was mailed rather than the date the Notice of Intent was mailed.

Further, the commissioner erred in applying Regulation 69-10(22) to add an additional two days to the cancellation date. This regulation provides:

> 22. Where a valid statutory, regulatory or contractual provision requires that notice be given a particular period of time before cancellation shall become effective, the insurer shall not be required to effect cancellation prior to the elapse of the period of time prescribed by such statute, regulation or contract; the running of such time shall commence the second business day following receipt by the insurer of the request for cancellation.

(emphasis added). This regulation tracks the requirement of § 38-39-90(d) which provides:

> (d) All statutory, regulatory, and contractual restrictions providing that the insurance contract may not be canceled unless notice is given to a governmental agency, mortgagee, or other third party apply where cancellation is effected under this section. The insurer shall give the prescribed notice in

> behalf of itself or the insured to any governmental agency, mortgagee, or other third party by the **second business day** after the day it receives the notice of cancellation from the premium service company and shall determine the effective date of cancellation taking into consideration the number of days' notice required to complete the cancellation.

(emphasis added).

Under the plain language of the statute, the additional two-day period calculated from the time the insurance carrier receives the NOC applies only in situations where a third-party, such as a lienholder, is entitled to notice. *E.g.*, Auto Now Acceptance Corp. v. Catawba Ins. Co., 351 S.C. 377, 570 S.E.2d 168 (2002) (before insurer may cancel a policy, it must provide notice of intent to cancel to third parties where it is affirmatively required to do so by statute, regulation or contract). Since there is no third-party involved here, this provision does not apply.

We conclude the commissioner erred in ruling that the policy was not cancelled in compliance with the notice requirements of § 38-39-90.

b. Failure to return unearned premium

As an alternative ground for finding the cancellation invalid, the commissioner ruled that Carrier's failure to refund unearned premiums to Finance Company with notice to Employer violated § 38-39-90.

Section 38-39-90(e) requires that "[w]henever an insurance contract is canceled, the insurer shall return whatever gross unearned premiums are due under the insurance contract to the premium service company which financed the premium for the account of the insured."[4] Under subsection (f), the

[4]In addition, Regulation 69-10(21) requires the return of unearned premiums within thirty days of cancellation and that a copy of the statement regarding the return to be sent to the insured.

premium service company must refund any surplus over three dollars[5] to the insured. By its terms, § 38-39-90 is the exclusive means for cancellation of an insurance contract by a premium service company. An insurance contract "may not be canceled by the premium service company unless the cancellation is effectuated in accordance with this section." § 38-39-90(a). Any violation of this section therefore invalidates cancellation. South Carolina Ins. Co. v. Brown, 280 S.C. 574, 313 S.E.2d 348 (Ct. App. 1984).

Here, Carrier never refunded the unearned portion of the annual premium. Since Carrier did not comply with all the requirements of § 38-39-90, neither attempted cancellation was valid. *Accord* Government Employees Ins. Co. v. Taylor, 310 A.2d 49 (Md. 1973).

The return of unearned premiums is not a mere "accounting matter" as appellants claim. We have held that where an insurance policy provides for the return of unearned premiums upon cancellation, the tender of a refund is a condition precedent to an effective cancellation. McElmurray v. American Fid. Fire Ins. Co., 236 S.C. 195, 113 S.E.2d 528 (1960). Here, the refund of unearned premiums is required by statute; all statutory provisions relating to insurance contracts become part of the insuring agreement. Allstate Ins. Co. v. Thatcher, 283 S.C. 585, 325 S.E.2d 59 (1985). A return of unearned premiums as required under § 38-39-90(e) is in effect part of Carrier's obligation under its policy and is therefore a condition precedent to an effective cancellation.

Appellants complain that requiring the return of unearned premiums to effectuate cancellation goes against the interest of Finance Company, the entity requesting cancellation, and therefore could not have been intended by the legislature. We disagree. Once Finance Company requested cancellation, it had the right to demand repayment of the unearned premium. The fact that it did not do so in this case does not vitiate the requirements placed on Carrier under the statute. Further, subsection (f) requires the premium service company to credit any return of unearned premiums to the account of the insured and "promptly refund" any surplus over three dollars. This provision

[5] This amount is now five dollars under the amended version of the statute.

works to the benefit of the insured and is an added protection ensuring notice to the insured.

Because Carrier failed to meet the requirement of subsection (e) of § 38-39-90 that it refund unearned premiums, cancellation was invalid under subsection (a) of the statute.

CONCLUSION

We need not address the commissioner's alternative ruling regarding waiver and estoppel. The judgment of the circuit court affirming the Commission's order is

AFFIRMED AS MODIFIED.

WALLER, BURNETT, PLEICONES, JJ., concur. TOAL, C.J., dissenting in a separate opinion.

CHIEF JUSTICE TOAL: I respectfully dissent because I disagree with the majority on the second issue. The majority affirms the commissioner's ruling on the basis that the insurer failed to refund insured's unearned premiums according to S.C. Code Ann. § 38-39-90 (2002). I disagree.

Section 38-39-90(e) provides in part, the following:

> Whenever an insurance contract is canceled, the insurer shall return whatever gross unearned premiums are due under the insurance contract to the premium service company which financed the premium for the account of the insured.

According to the plain meaning of this statute, in my opinion, an insurer's duty to refund unearned premiums is not a precondition for cancellation. Although the statute requires that a refund be tendered, the plain meaning of the statute requires the insurer to refund the unearned premiums after cancellation. In my opinion, therefore, the statute makes the insurer liable for unearned premiums. It does not, however, operate to invalidate the insurer's prior cancellation of coverage.

Accordingly, I would reverse and hold that insurer's cancellation of coverage was effective despite insurer's failure to tender the refund as required in S.C. Code Ann. § 38-39-90(e).

THE STATE OF SOUTH CAROLINA
In The Supreme Court

South Carolina Department of Social Services, Respondent,

v.

Kimberly Cochran, Appellant.

Re: Tyler Dane Cochran, a minor child under the age of eighteen.

Appeal From Horry County
James A. Spruill, III, Family Court Judge

Opinion No. 25997
Heard May 3, 2005 - Filed June 6, 2005

AFFIRMED

Kimberley Elizabeth Campbell, of Patrick Law Firm, LLC, of Surfside Beach, for Appellant.

Celeste Moore, of South Carolina Department of Social Services, of Columbia, for Respondent.

Melissa Meyers Frazier, of N. Myrtle Beach, for Guardian Ad Litem.

JUSTICE BURNETT: This is an appeal from an order terminating Kimberly Cochran's (Appellant's) parental rights to her child,

Tyler Dane Cochran (Child). Appellant appeals various aspects of the family court order, which was issued after we reversed and remanded the action concluding the South Carolina Department of Social Services (DSS) failed to establish the chain of custody of two drug tests. South Carolina Dept. of Social Services v. Cochran, 356 S.C. 413, 589 S.E.2d 753 (2003). We affirm.

FACTUAL/PROCEDURAL BACKROUND

DSS temporarily removed Child from the home of Appellant and Bobby Cochran (Father) in August 1997 after Father had physically abused the child. Child was returned to Appellant subject to conditions imposed by the family court judge. Appellant was required to submit to drug testing, seek drug treatment, and complete parenting and marriage counseling. If Appellant tested positive for drugs, Child would immediately be removed from her custody. Appellant, thereafter, tested positive for cocaine, and DSS took custody of Child in November 1997.

A permanency planning hearing took place on July 30, 1998. The family court judge concluded DSS would retain custody of Child and could proceed to terminate the parental rights of both Appellant and Father. The family court terminated Appellant's parental rights based on the following grounds: 1) pursuant to S.C. Code Ann. § 20-7-1572(2) (Supp. 2004), Appellant had failed to remedy or rehabilitate the situation which caused the initial removal of Child; 2) pursuant to S.C. Code Ann. § 20-7-1572(6) (Supp. 2004), Appellant had a diagnosed drug addiction, which prevented her from providing minimally acceptable care for Child; 3) pursuant to S.C. Code Ann. § 20-7-1572(8) (Supp. 2004), Child had been in foster care for fifteen of the previous twenty-two months; and 4) termination was in the best interest of the child.

In the first appeal, we concluded the family court erred in determining DSS had established a proper chain of custody for Appellant's blood samples used for drug testing in May and June of 2000. We concluded the scope of Appellant's drug addiction was unclear because DSS did not establish a proper chain of custody for key evidence to support the allegation

Appellant failed the May and June blood tests. We reversed and remanded the case to the trial court with leave to open the record and receive any other evidence pertinent to a determination of whether Appellant had overcome her drug addiction and to provide DSS the opportunity to present a proper chain of custody for Appellant's blood samples.

On remand, the trial court terminated Appellant's parental rights based on the following grounds: 1) Appellant failed to remedy the conditions which caused the removal of Child as required by S.C. Code Ann. § 20-7-1572(2) (Supp. 2004) and 2) Appellant has a diagnosable condition of drug addiction pursuant to S.C. Code Ann. § 20-7-1572 (6) (Supp. 2004) and this condition makes Appellant unlikely to provide minimally acceptable care for Child. In so holding, the trial court determined DSS established the chain of custody required for the May and June 2000 drug tests.

ISSUES

I. Did the trial court abuse its discretion in determining DSS established the chain of custody for the May and June 2000 blood samples?

II. Did the trial court err in terminating Appellant's parental rights on the ground she had a diagnosable condition of drug addiction making her unlikely to provide minimally acceptable care for Child?

III. Did the trial court err in terminating Appellant's parental rights on the ground she failed to remedy the conditions which led to Child's removal?

STANDARD OF REVIEW

The family court will terminate parental rights and free a child for adoption if it finds one of the nine statutory grounds for termination has been met and that "termination is in the best interest of the child." S.C. Code Ann. § 20-7-1578 (Supp. 2004). The family court judge terminated

Appellant's parental rights pursuant to two statutory grounds. S.C. Code Ann. §§ 20-7-1572 (2) and (6) (Supp. 2004). DSS must prove these grounds by clear and convincing evidence. Santosky v. Kramer, 455 U.S. 745, 102 S.Ct. 1388, 71 L.Ed.2d 599 (1982); Richland County v. Earles, 300 S.C. 24, 496 S.E.2d 864 (1998). When reviewing the family court decision, this Court may make its own conclusions of whether DSS proved by clear and convincing evidence that parental rights should be terminated. South Carolina Dep't of Social Services v. Broome, 307 S.C. 48, 413 S.E.2d 835 (1992).

LAW/ANALYSIS

The termination of the legal relationship between natural parents and a child presents one the most difficult issues this Court is called upon to decide. We exercise great caution in reviewing termination proceedings and will conclude termination is proper only when the evidence clearly and convincingly mandates such a result.

In cases involving the termination of parental rights, there exist two, often competing, interests: those of the parents and those of the child. Parents have a fundamental interest in the care, custody, and management of their children. Parental rights warrant vigilant protection under the law and due process mandates a fundamentally fair procedure when the state seeks to terminate the parent-child relationship. However, a child has a fundamental interest in terminating parental rights if the parent-child relationship inhibits establishing secure, stable, and continuous relationships found in a home with proper parental care. In balancing these interests, the best interest of the child is paramount to that of the parent. South Carolina Dep't of Social Services v. Vanderhorst, 287 S.C. 554, 340 S.E.2d 149 (1986).

Recognizing the termination of parental rights to be one of most severe actions a state can take against its citizens, we turn to the issues presented in determining whether it is in the best interest of Child that all legal relations with Appellant be terminated.

I.
(Chain of Custody)

Appellant argues the trial court erred in determining DSS established a proper chain of custody with respect to the May 1, 2000 sample and the June 7, 2000 sample.

DSS has the burden to establish a chain of custody for the blood samples "as far as practicable." State v. Williams, 297 S.C. 290, 376 S.E.2d 773 (1989). We have explained:

> [T]he party offering such specimen is required to establish, at least as far as practicable, a complete chain of evidence, tracing from the time the specimen is taken from the human body to the final custodian by whom it is analyzed. Where the substance analyzed has passed through several hands the evidence must not leave it to conjecture as to who had it and what was done with it between the taking and the analysis.

Benton v. Pellum, 232 S.C. 26, 33-34, 100 S.E.2d 534, 537 (1957) (cited in Raino v. Goodyear Tire and Rubber Co., 309 S.C. 255, 258, 422 S.E.2d 98, 99-100 (1992)).

The two samples in question were tested at a North Carolina testing facility of Laboratory Corporation of America (LabCorp). In the first trial, DSS presented only the telephonic deposition of Steven Ivey, an employee of LabCorp. Ivey testified generally as to who would have handled the samples and how the testing of the samples would have occurred. He also testified he did not handle the samples, nor did he know which employee handled them. We concluded Ivey's testimony was insufficient to establish the chain of custody recognizing that while the chain of custody DSS is required to establish need not be perfect, Ivey presented no direct evidence of how those specific blood samples were processed. Cochran, 356 S.C. at 419, 589 S.E.2d at 756.

In the second trial, from which this appeal is taken, DSS presented additional testimony of the chain of custody for the two samples. On appeal, Appellant's primary contention is DSS did not establish the chain of custody because the person who drew blood and sealed the containers did not testify, nor did the persons to whom the samples were delivered. Additionally, the identity of the courier who transported the samples from the collecting site to the testing facility is unknown. We conclude the absence of testimony from these persons and the unknown identity of the courier fails to render the chain of custody incomplete.

All witnesses who testified they handled and tested the blood identified their signatures on the chain of custody sheets and described their respective procedure for handling it and the testing performed. The witnesses testified the samples would have each been taken from the collecting site in a sealed package to the laboratory in Research Trial Park by a LabCorp courier who made daily pick-ups and deliveries. The chain of custody form and the witnesses testimony indicate the two samples were delivered to a Jackie Johnson and a Corey Sweeney, respectively. Johnson and Sweeney were no longer employed by LabCorp and not available as witnesses.

According to the May 1 Specimen Security System/Chain of Custody Request Form, Jackie Johnson received the sample from the courier on May 2, 2000. Johnson signed the form which stated "rec'd from the courier/seals intact/aliquot transferred to temporary storage." The form was also signed by Kathy Kejales, the LabCorp phlebotomist who drew the blood, Jackie Johnson, and Appellant. Kejales was no longer employed at the collection site and could not be located to testify. The June 7, 2000 sample arrived at LabCorp on June 8, 2000. The sample was received from the courier by Corey Sweeney. The Specimen Security System/Chain of Custody Request Form was also signed by Kathy Kejales, Sweeney, and Appellant.

We have consistently held complete chain of evidence must be established as far as practicable, tracing possession from the time the specimen is taken from the human body to the final custodian by whom it is

analyzed. State v. Carter, 344 S.C. 419, 424, 544 S.E.2d 835, 837 (2001). However, we have never held the chain of custody rule requires every person associated with the procedure be available to testify or identified personally, depending on the facts of the case. In this case, every person who handled the blood samples has been identified, except the courier who transported the samples from the collection site to the testing facility.

The testimony presented by DSS indicates the blood samples were secure when Kejales took the samples at the collection site. The testimony also indicates the samples arrived at the testing facility sealed and intact. Additionally, each person involved in the actual testing procedure once the samples arrived at the facility, testified as to their handling of each respective sample and the chain of custody. Generally, we will uphold the chain of custody if the safeguards instituted ensure the integrity of the evidence, even if every person associated with the procedure is not personally identified.[1] Other courts are in accord.

In Logan v. Personnel Bd. of Jefferson County, 657 So.2d 1125 (Ala. Ct. App. 1995) the Alabama Court of Appeals upheld the chain of custody even though the courier who transported the sample from the collection site was neither named, nor identified, other than as "courier." In Logan, as in the present case, the individual collecting the sample executed the chain of custody document verifying the specimen had been received by the donor. In Logan, the Director of Toxicology at Roche Biomedical Laboratories testified about the drug testing procedures. He testified the sample was delivered by the lab's courier and the person who received the sample indicated by her signature on the form the seals were intact and there was no sign of tampering. The Alabama court stated:

[1] Whether the chain of custody has been established as far as practicable clearly depends on the unique factual circumstances of each case. Our holding is not intended to suggest the nonsensical result that, in every case in which a courier is unidentified, the chain of custody is necessarily established.

> The evidence need not negate the most remote possibility of substitution, alteration, or tampering with the evidence, but rather must prove to a *reasonable probability* that the item is the same as, and not substantially different from, the object as it existed at the beginning of the chain. Id. at 1127. See also Cain v. Jefferson Parish Dept. of Fleet Management, 701 So.2d 1059 (La. Ct. App. 1997) (chain of custody established although name of courier at time of pick-up and delivery was not disclosed on the form); In the Matter of Lalama, 779 A.2d 444 (N.J. Super. 2001) (even though courier failed to complete transmittal forms, the integrity of the sample was demonstrated by other compelling evidence); Lucas v. Voirol, 136 S.W.3d 477 (Ky. Ct. App. 2004) (upholding routine procedure by which correction officers place samples into locked boxed until couriers, even if not personally identified, retrieve them for delivery to the lab).

Similarly, we have held proof of chain of custody need not negate all possibility of tampering so long as the chain of possession is complete. Williams, 297 S.C. at 293, 376 S.E.2d at 774. For the foregoing reasons, we conclude, under the facts of this case, DSS has sustained its burden of establishing the chain of custody.

II.
(Diagnosable Condition of Drug Addiction)

The trial court terminated Appellant's parental rights, in part, pursuant to S.C. Code Ann. § 20-7-1572 (6) (Supp. 2004) because she has a diagnosable condition of drug addiction. We have concluded DSS established the chain of custody for the May and June samples and affirmed the decision of the trial court to terminate Appellant's parental rights based on a diagnosable condition of drug addiction. The scope of Appellant's drug addiction is clear because DSS established the proper chain of custody for the evidence supporting its allegation Appellant failed these two drug tests. We conclude this drug evidence has now been properly authenticated and affirm.

III.
(Failure to Remedy Conditions)

The family court also terminated Appellant's parental rights on grounds Appellant failed to remedy the conditions which caused the removal of Child pursuant to S.C. Code Ann. § 20-7-1572 (2). We affirm.

Appellant has not remedied the conditions for removal because 1) the evidence does not indicate she has been rehabilitated and 2) Appellant's relationship with Bobby Cochran is ongoing and not in the best interest of Child.

When asked by the Guardian Ad Litem whether she had any evidence of her current sobriety, Appellant responded she did not. Appellant admitted that prior to the termination of parental rights (TPR) hearing, she had been in and out of drug treatment programs on five different occasions but had completed a session of alcohol and drug abuse counseling. Appellant stated she has not attended any drug counseling sessions or treatment programs since the TPR hearing.

Second, Appellant continued to live with Bobby Cochran at the time of the remand hearing. Appellant admitted she had been advised by a counselor to leave Cochran because she stood a good chance of relapsing if she stayed with him. There is also evidence indicating Bobby Cochran is a drug user. According to a Petition for an Order of Protection Appellant filed against him in March 1994, Appellant caught Bobby "shooting drugs" while he was "with another woman" in their mobile home.

There is also evidence indicating Appellant abuses alcohol. Although she stated she "never drank alcohol," this statement was refuted by Officer Brown of the Horry County Police Department. Brown testified he went to the Cochran home on February 16, 2004, to respond to a domestic dispute call. He testified both Appellant and Bobby Cochran "appeared to be intoxicated."

Appellant's relationship with Bobby Cochran is clearly detrimental to Child's best interests. DSS temporarily removed Child in August 1997 after discovering Bobby Cochran had physically abused Child. The couple has a history of domestic violence. When Child was in their custody, Appellant pulled a knife on Bobby Cochran at Child's first birthday party at a Burger King restaurant.

The marital problems continued at the time of the May 2004 hearing. When asked how many times law enforcement had been summoned to her home, Appellant replied "maybe once a year." In 2003, Appellant was arrested for criminal domestic violence (CDV) against Bobby. On February 16, 2004, Appellant was again arrested for CDV.

It is not in the best interest of Child to be returned to an environment where Appellant has failed to show she has recovered from her drug addiction and domestic violence is persistent. The fundamental purpose of terminating parental rights is to provide the greatest possible protection to a child whose parents are unwilling or unable to provide adequate care for the physical, emotional, and mental needs of the child. Appellant has proven unable to provide a secure, stable, and adequate environment for rearing a child. We, therefore, affirm the decision to terminate Appellant's parental rights.

CONCLUSION

For the foregoing reasons, we conclude DSS established the chain of custody for the two drug samples and affirm the family court's decision to terminate Appellant's parental rights pursuant to S.C. Code Ann. § 20-7-1572(2) and (6).

AFFIRMED.

TOAL, C.J., MOORE, WALLER and PLEICONES, JJ., concur.

The Supreme Court of South Carolina

The State, Respondent,

v.

Tyree Alphonso Roberts, a/k/a
Abdiyyah Ben Alkebulanyahh, Appellant.

ORDER

Appellant was sentenced to death on October 22, 2003. The case is now before this Court on direct appeal. Joseph Savitz and Robert M. Dudek, of the Office of Appellate Defense, serve as counsel for appellant. They served and filed the initial brief on February 22, 2005.

Appellant now moves to proceed pro se, arguing the warden and appellate counsel are acting to deny him access to the courts. He maintains he does not want the assistance of attorneys from the Office of Appellate Defense and that he "rejected" them prior to their filing the initial brief and continues to reject them and any action they take on appellant's behalf. In support of his request to proceed pro se, appellant contends S.C. Code Ann. § 16-3-25(D) states that, "Both the defendant and the State shall have the right to submit briefs within the time provided by the court and to present oral

arguments to the court."

By way of return, appellate counsel take the position that the Court should not allow self-representation on direct appeal. They assert that while a pro se defendant who mishandles a trial harms only himself, a pro se defendant who mishandles a direct appeal damages the criminal justice system as a whole. Finally, appellate counsel argue that even if the Court allows self-representation on appeal from a criminal conviction, it should require the appellant to exercise that option before appellate counsel files the initial brief and designation of matter.

The State has filed a return in which it argues there is no federal constitutional right to self-representation on direct appeal and this State has not recognized such a right under its own constitution, see Martinez v. Court of Appeal of California, 528 U.S. 152, 120 S.Ct. 684, 145 L.Ed.2d 597 (2000), although it acknowledges that the Court has noted it is questionable whether Art. I, § 14 of the South Carolina Constitution applies to appellate matters.[1] Foster v. State, 298 S.C. 306, 379 S.E.2d 907 (1989). The State

[1] "The right of trial by jury shall be preserved inviolate. Any person charged with an offense shall enjoy the right to a speedy and public trial by an impartial jury; to be fully informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have

argues that constitutional provision applies only to trials and not appellate proceedings.

The State argues further that appellant has the assistance of two very experienced capital appeals litigators and they have already filed a brief in this matter. The State contends it is simply too late to stop the process, go back to the beginning and allow submission of new substantive arguments simply because appellant is not satisfied with the issues raised by appellate counsel. The State maintains appellate counsel are entitled to make a reasonable choice not to raise every non-frivolous issue requested by appellant, see Jones v. Barnes, 436 U.S. 745, 103 S.Ct. 3308, 77 L.Ed.2d 987 (1983), and any mistake they make in determining viable issues for briefing can be resolved on post-conviction relief instead of by way of a pro se brief on direct appeal.

By way of reply, appellant maintains Mr. Savitz is incompetent and ineffective. He points to Mr. Savitz's failure to raise any guilt phase errors or constitutional errors in the initial brief. Appellant contends the record clearly reflects that during the pre-trial and guilt phase, appellant

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compulsory process for obtaining witnesses in his favor, and to be fully heard in his defense by himself or by his counsel or by both."

sought "instant relief or release" based on Fourth Amendment violations and a lack of evidence. He claims these two issues are the most significant and meritorious and should have been raised in the initial brief. Appellant maintains he cannot raise the insufficiency of the evidence on post-conviction relief.

This Court has repeatedly held, pursuant to Faretta v. California, 422 U.S. 806, 95 S.Ct. 2525, 45 L.Ed.2d 562 (1975), that a criminal defendant may waive the right to counsel and proceed pro se at trial. State v. Fuller, 337 S.C. 236, 523 S.E.2d 168 (1999); State v. Stuckey, 333 S.C. 56, 508 S.E.2d 564 (1998); State v. Reed, 332 S.C. 35, 503 S.E.2d 747 (1998); State v. Brewer, 328 S.C. 117, 492 S.E.2d 97 (1997); State v. Sims, 304 S.C. 409, 405 S.E.2d 377 (1991); State v. Dixon, 269 S.C. 107, 236 S.E.2d 419 (1977). However, we have never addressed whether a criminal defendant has the same right on appeal.

In Martinez, supra, the United States Supreme Court held that the rationale underlying the Faretta decision, including reliance on the Sixth Amendment, did not apply to appellate proceedings. The Court also found no right of self-representation under the Due Process Clause. Accordingly, a

right of self-representation on appeal must be grounded in the state constitution, if at all. The majority of the states that have addressed this issue following Martinez have found there is no state constitutional right to self-representation on appeal.

Article I, § 16 of the Florida Constitution states the following:

> In all criminal prosecutions the accused shall, upon demand, be informed of the nature and cause of the accusation, and shall be furnished a copy of the charges, and shall have the right to have compulsory process for witnesses, to confront at trial adverse witnesses, to be heard in person, by counsel or both, and to have a speedy and public trial by impartial jury in the county where the crime was committed.

The Florida Supreme Court found, despite this language, which is very similar to Art. I, § 14 of the South Carolina Constitution, that in Florida there is no state constitutional right to proceed pro se on direct appeal, although the appellate court may, in its discretion, allow an appellant to proceed pro se. Davis v. State, 789 So.2d 978 (Fla. 2001). The New Hampshire Supreme Court has also determined its state constitution provides no due process right to a defendant to proceed pro se on appeal.[2] State v. Thomas, 840 A.2d 803

[2] Part 1, § 15 of the New Hampshire Constitution states:

(N.H. 2003). Appellate courts in Arkansas, Texas and Washington have also held, in reliance upon Martinez, that an appellant in a criminal case does not have the right to proceed pro se on direct appeal in those states. Fudge v. State, 19 S.W.3d 22 (Ark. 2000); Cormier v. State, 85 S.W.3d 496 (Tex. App. 2002); State v. Watson, 2000 WL 339179 (Wash. App. 2000).

The Alabama Supreme Court held that while the Alabama Constitution does not provide any basis for recognizing a right to self-representation on appeal,[3] certain statutes, when read together, give an

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> No subject shall be held to answer for any crime, or offense, until the same is fully and plainly, substantially and formally described to him; or be compelled to accuse or furnish evidence against himself. Every subject shall have a right to produce all proofs that may be favorable to himself; to meet the witnesses against him face to face, and to be fully heard in his defense, by himself, and by counsel. No subject shall be arrested, imprisoned, despoiled, or deprived of his property, immunities, or privileges, put out of the protection of the law, exiled or deprived of his life, liberty, or estate, but by the judgment of his peers, or the law of the land; provided that, in any proceeding to commit a person acquitted of a criminal charge by reason of insanity, due process shall require that clear and convincing evidence that the person suffers from a mental disorder must be established. Every person held to answer in any crime or offense punishable by deprivation of liberty shall have the right to counsel at the expense of the state if need is shown; this right he is at liberty to waive, but only after the matter has been fully explained to the court.

[3] Article I, § 6 of the Alabama Constitution states:

> [I]n all criminal prosecutions, the accused has a right to be heard by himself and counsel, or either; to demand the nature and cause of the accusation; and to have a copy thereof; to be confronted by

appellant in a criminal case a statutory right to do so.[4] Ex parte Scudder, 789 So.2d 837 (Ala. 2001).

Other states had determined prior to the decision in Martinez that there is no constitutional right to self-representation on appeal from a criminal conviction. In Blandino v. State, 914 P.2d 624 (Nev. 1996), the Supreme Court of Nevada held that the Sixth Amendment only applies to trials and does not support the existence of a right to self-representation on appeal. The same has been held in Tennessee. State v. Gillespie, 898 S.W.2d 738 (Tenn. Crim. App. 1994).

However, there have been two states, Georgia and Michigan, who

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> the witnesses against him; to have compulsory process for obtaining witnesses in his favor; to testify in all cases, in his own behalf, if he elects so to do; and, in all prosecutions by indictment, a speedy, public trial, by an impartial jury of the county or district in which the offense was committed; and he shall not be compelled to give evidence against himself, nor be deprived of life, liberty, or property, except by due process of law . . . .

[4] The statutes relied upon by the Alabama Supreme Court are the statute which provides for the right to appeal and the statute which states that an indigent appellant is entitled to the assistance of counsel. The former states, "A person convicted of a criminal offense in the circuit court or other court from which an appeal lies directly to the Supreme Court or Court of Criminal Appeals may appeal from the judgment of conviction to the appropriate appellate court." Ala. Code § 12-22-130 (1975). The latter states, "If it appears that the defendant desires to appeal and is unable financially or otherwise to obtain the assistance of counsel on appeal and the defendant expresses the desire for assistance of counsel, the trial court shall appoint counsel to represent and assist the defendant on appeal." Ala. Code § 15-12-22(b) (1975). The Alabama Supreme Court found that these sections do not require that an appellant in a criminal case proceed with his appeal through counsel, but instead confer upon a defendant in a criminal case the right to represent himself on appeal if he so desires.

have determined that an appellant may proceed pro se in an appeal from a criminal conviction based on a state constitutional provision that contains language nearly identical to that found in S.C. Code Ann. § 40-5-80 (Supp. 2004). Costello v. State, 522 S.E.2d 572 (Ga. 1999); People v. Stephens, 246 N.W.2d 429 (Mich. App. 1976). That statute states nothing in Chapter 5 of Title 40, regulating the practice of law in South Carolina, may be construed so as to prevent a citizen from prosecuting or defending his own cause, if he so desires.[5] We note that New Hampshire, which has a statute containing nearly identical language, has held, in State v. Thomas, supra, that a criminal defendant does not have a right to proceed pro se on appeal, relying on the fact that its state constitution does not provide such a right. The New Hampshire Supreme Court did not mention N.H. Rev. Stat. § 311:1, which states that "[a] party in any cause or proceeding may appear, plead, prosecute or defend in his or her proper person, that is, pro se, or may be represented by any citizen of good character."

Appellant clearly does not have a federal constitutional right to

[5] Article I, Section I, Paragraph XII of the Georgia Constitution states: "No person shall be deprived of the right to prosecute or defend, either in person or by an attorney, that person's own cause in any of the courts of this state." Article I, Section 13 of the Michigan Constitution states: "A suitor in any court of this state has the right to prosecute or defend his suit, either in his own person or by an attorney."

proceed pro se in this appeal from his criminal conviction. We also find there is no state constitutional provision which confers such a right. We agree with the Florida, New Hampshire and Alabama Supreme Courts that language such as that contained in Art. I, § 14 of the South Carolina Constitution does not apply to appeals. However, the Court may, in its discretion, allow an appellant to proceed pro se in an appeal from a criminal conviction.

We decline to do so in this case. Initially, we note that appellant's request to proceed pro se was not made in a timely fashion. Moreover, appellate counsel has no duty to raise every non-frivolous issue presented by the record and must be allowed to exercise reasonable professional judgment. See Jones v. Barnes, supra. This is a death penalty appeal and, as the State points out, appellant is represented by two very experienced capital appeals litigators. Finally, the State is also correct that any mistake appellate counsel make in determining viable issues for briefing can be resolved on post-conviction relief. We therefore deny appellant's motion to proceed pro se.

IT IS SO ORDERED.

s/Jean H. Toal C.J.

s/James E. Moore J.

s/John H. Waller, Jr. J.

s/E. C. Burnett, III J.

s/Costa M. Pleicones J.

Columbia, South Carolina

June 3, 2005