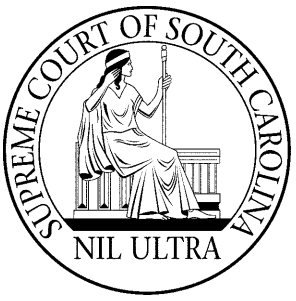

OPINIONS

OF

THE SUPREME COURT

AND

COURT OF APPEALS

OF

SOUTH CAROLINA

ADVANCE SHEET NO. 30
July 27, 2016
Daniel E. Shearouse, Clerk
Columbia, South Carolina
www.sccourts.org

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The Supreme Court of South Carolina

In the Matter of David A. Collins, Respondent.

Appellate Case Nos. 2016-001503 & 2016-1504

ORDER

The Office of Disciplinary Counsel petitions this Court to place respondent on interim suspension pursuant to Rule 17(b) of the Rules for Lawyer Disciplinary Enforcement (RLDE) contained in Rule 413 of the South Carolina Appellate Court Rules (SCACR). The petition also seeks appointment of the Receiver pursuant to Rule 31, RLDE, Rule 413, SCACR. Respondent consents to the relief requested in the petition.

IT IS ORDERED that respondent's license to practice law in this state is suspended until further order of this Court.

IT IS FURTHER ORDERED that Peyre Thomas Lumpkin, Esquire, Receiver, is hereby appointed to assume responsibility for respondent's client files, trust account(s), escrow account(s), operating account(s), and any other law office accounts respondent may maintain. Mr. Lumpkin shall take action as required by Rule 31, RLDE, Rule 413, SCACR, to protect the interests of respondent's clients. Mr. Lumpkin may make disbursements from respondent's trust account(s), escrow account(s), operating account(s), and any other law office accounts respondent may maintain that are necessary to effectuate this appointment.

This Order, when served on any bank or other financial institution maintaining trust, escrow and/or operating account(s) of respondent, shall serve as an injunction to prevent respondent from making withdrawals from the account(s) and shall further serve as notice to the bank or other financial institution that Peyre Thomas Lumpkin, Esquire, Receiver, has been duly appointed by this Court.

Finally, this Order, when served on any office of the United States Postal Service,

shall serve as notice that Peyre Thomas Lumpkin, Esquire, Receiver, has been duly appointed by this Court and has the authority to receive respondent's mail and the authority to direct that respondent's mail be delivered to Mr. Lumpkin's office.

Mr. Lumpkin's appointment shall be for a period of no longer than nine months unless an extension of the period of appointment is requested.

Within fifteen days of the date of this order, respondent shall serve and file the affidavit required by Rule 30, RLDE. Should respondent fail to timely file the required affidavit, he may be held in civil and/or criminal contempt of this Court as provided by Rule 30, RLDE.

s/ Costa M. Pleicones C.J.

Columbia, South Carolina

July 20, 2016

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

Wilfred Allen Woods, Respondent,

v.

Etta Catherine Woods, Appellant.

Appellate Case No. 2012-213719

Appeal From Barnwell County
W. Thomas Sprott, Jr., Family Court Judge

Opinion No. 5430
Heard May 12, 2015 – Filed July 27, 2016

AFFIRMED IN PART, REVERSED IN PART

Jon Terry Clabaugh, Jr., of Columbia, for Appellant.

Michael P. O'Connell, of Stirling & O'Connell, of Mount Pleasant, for Respondent.

MCDONALD, J.: In this appeal from family court, Appellant Etta Woods (Wife), argues the family court erred in (1) denying her motion to dismiss because the court lacked jurisdiction based on the parties' prior agreement; (2) reducing alimony from $8,000 to $4,000; (3) providing for an automatic decrease in alimony two years in the future; (4) granting Respondent Wilfred Woods's (Husband) motion to reconsider; and (5) failing to require Husband to pay any portion of her attorney's fees. We affirm in part and reverse in part.

FACTS AND PROCEDURAL HISTORY

Husband and Wife were married on August 4, 1973, and separated on or about October 25, 1997. By order filed in Barnwell County on June 2, 1999 (Divorce Decree), the couple divorced on the ground of one year's continuous separation. The parties' only child was already emancipated when the parties divorced.

The Divorce Decree approved and incorporated a property settlement agreement (Agreement) by which the parties resolved all issues arising from their marriage, including Husband's obligation to pay Wife permanent, periodic alimony of $8,000 per month. Section I of the Agreement is titled "SPOUSAL SUPPORT" (Spousal Support Section). Paragraphs B and E of the Spousal Support Section, in relevant part, state as follows:

> [Husband] shall pay directly to [Wife] the sum of [$8,000] per month, as and for permanent, periodic alimony, commencing June 1, 1999, and payable on the first of each month thereafter. The alimony payments provided for in this [A]greement shall be taxable to [Wife] for federal and state income tax purposes and deductible to [Husband]. These alimony payments shall terminate on the remarriage or death of [Wife] or upon the death of [Husband] . . . .
>
> . . . .
>
> The parties agree that this permanent, periodic alimony shall not be modifiable by [Husband] for a period of [three] years from the date of the approval of this Agreement so long as [Husband's] total gross income (as defined by the Internal Revenue Code, including but not limited to tax exempt income) is not less than [$500,000] per year. In the event that [Husband] conveys any of his interest in Gilliam & Associates, Inc., in any form, including but not limited to an acquisition, merger, recapitalization, restructure, or other transference or disposal in any fashion whatsoever which provides a benefit to [Husband] and which reduces his income to below [$500,000] per year, [Husband] acknowledges that

> this conveyance shall be subject to review by the Family Court for the Second Judicial Circuit for the purposes of a reduction of alimony.

Section XVIII of the Agreement is titled "APPROVAL, NON-MODIFICATION AND ENFORCEMENT OF AGREEMENT" (Approval, Non-modification and Enforcement Section). Section XVIII, paragraph D, provides, in relevant part:

> It is the intent of the parties that the provisions of this Agreement shall govern all rights and obligations of the parties as well as all rights of modification; and, further, that the terms and conditions of this Agreement and any Order approving the same shall not be modifiable by the parties or any court without the written consent of the Husband and Wife. The parties specifically agree, except as set forth herein, that neither the Family Courts of the State of South Carolina nor any other court shall have jurisdiction to modify, supplement, terminate, or amend this Agreement or the rights and responsibilities of the parties hereunder, except as to child support, custody and visitation, which the parties understand to be modifiable as a matter of law.

On December 2, 2010, Husband brought this action seeking a modification of his alimony obligation due to a changed circumstance—namely, an alleged substantial decrease in his income since the issuance of the Divorce Decree. Wife contended the family court lacked jurisdiction to modify alimony based on the terms of the parties' Agreement, arguing: (1) "the changed circumstance alleged by Husband was voluntary and intentionally created by him and did not constitute a valid changed circumstance justifying an alimony reduction," (2) "the court should consider Husband's earning capacity and assets for the purposes of any alimony modification," and (3) Wife should receive an "increase in alimony based on a change in circumstances, namely an alleged substantial increase in Husband's income or earning capacity and assets since the [Divorce Decree]."

On April 12, 2011, Wife moved to dismiss, asserting that the family court lacked subject matter jurisdiction to modify alimony based on the parties' agreement. The

Honorable Dale Moore Gable heard the motion on June 13, 2011, and denied the motion from the bench.[1] However, Judge Gable's August 26, 2011 order expressly left review of the alimony modification issue to the judge presiding at the final hearing:

> IT IS THEREFORE ORDERED AND DECREED THAT [Wife's] Motion to Dismiss is denied; However
>
> IT IS FURTHER ORDER [sic] AND DECREED THAT that [sic] the Judge at the Final Hearing is not bound by this denial and after listening to testimony from the parties and witnesses may find that [Husband's] alimony obligation to [Wife] is, or is not, modifiable based upon a substantial change in circumstances.

Additionally, Judge Gable quoted section 1 of the Agreement, "SPOUSAL SUPPORT," and paragraph XVIII(D), finding both to be "unambiguous and clear." Trial was initially scheduled to begin on September 12, 2011, but was continued by order dated November 21, 2011. In this order, the family court provided that if the court "determines that a modification of the Defendant's[2] [sic] support obligations as set forth in the divorce decree is warranted, the [family court] shall have the discretion to make any adjustments retroactive to the date this trial was originally scheduled to commence (i.e. September 12, 2011)."

In February 2012, Husband amended his complaint based on alleged additional changed circumstances, including (1) a reduction in his income substantially below $500,000 per year, (2) the conveyance of his interest in the business Gilliam & Associates, Inc. (Gilliam & Associates), and (3) a decrease in Wife's expenses and her anticipated receipt of social security benefits. Husband also requested that any alimony reduction or termination be made "retroactive to the date of filing and at

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[1] Although the parties' briefs and paragraph two of Judge Gable's order state that the hearing on the motion to dismiss was held on July 13, 2011, the transcript of the hearing and the caption of Judge Gable's order set forth that the hearing was held on June 13, 2011.

[2] The context of the order makes clear that the family court intended to reference Plaintiff's (Husband's) support obligations.

least retroactive to the date of the previously scheduled [f]inal [h]earing in September, 2011. . . ." Wife amended her responsive pleading, again asserting the family court lacked jurisdiction to modify alimony based on the parties' Agreement. Wife argued the sale of Husband's interest in the business was "contemplated or anticipated" at the time of the divorce and as such did not constitute a changed circumstance justifying an alimony modification.

On August 7, 2012, the Honorable W. Thomas Sprott, Jr., heard pretrial motions, including Wife's motion to dismiss. That same day, Judge Sprott notified both parties that he would be denying Wife's motion to dismiss. Trial was held on August 8–10, 2012. By order filed November 30, 2012 (Final Order), Judge Sprott (1) denied Wife's motion to dismiss; (2) reduced Husband's permanent, periodic alimony obligation from $8,000 to $4,000 per month commencing November 1, 2012; (3) stated the alimony would be taxable to Wife and deductible by Husband for income tax purposes; (4) provided that alimony would be further reduced by the amount of social security benefits to which Wife would be entitled when she reaches age sixty-two even if she defers taking benefits at that time; and (5) required both parties to pay their own attorney fees and costs.[3]

On December 12, 2012, Husband served Wife via facsimile with a motion to reconsider, stating he had received written notice of the entry of the Final Order on December 3, 2012, and sought an order reducing alimony from $8,000 to $4,000 per month retroactively to September 2011 (when the case was initially scheduled to be tried).[4] On December 28, 2012, Wife served her notice of appeal challenging the Final Order and Interim Orders.

On January 14, 2013, the family court granted Husband's motion to reconsider. Husband had continuously paid Wife $8,000 monthly alimony from June 1999 through October 2012. In order to give effect to the retroactive reduction in

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[3] The family court issued two interim orders, both of which were filed on November 30, 2012 (Interim Orders). These Interim Orders reduced Husband's alimony payment to $4,000 per month for the months of November 2012 and December 2012 pending issuance of the Final Order.

[4] Husband's motion to reconsider was served upon Wife by mail on December 19, 2012.

alimony to September 12, 2011, the family court ordered Husband to start paying Wife reduced alimony of $2,000 monthly beginning on November 1, 2012, until Husband was fully reimbursed for the overpayments.

On January 23, 2013, Wife served a motion to reconsider the order granting Husband's motion to reconsider. On February 25, 2013, the family court allowed Wife to file a return to Husband's motion to reconsider and stayed the January 2013 order granting Husband's motion to reconsider. Wife filed a return to Husband's motion to reconsider on March 8, 2013. The parties filed a stipulation on September 26, 2013, regarding the fax transmission of Husband's motion to reconsider.

On September 4, 2013, this court remanded the case to the family court for the limited purpose of ruling on any pending motions that might affect the appeal, including the motions to reconsider. On October 28, 2013, the family court issued a second order, granting Husband's motion to reconsider and vacating the January 2013 order.

On November 27, 2013, Wife served a notice of appeal challenging the October 2013 order granting Husband's motion to reconsider. On January 27, 2014, this appeal was consolidated with Wife's prior appeal of the Final Order and Interim Orders.[5]

ISSUES ON APPEAL

I. Did the family court err in denying Wife's motion to dismiss because it lacked jurisdiction to modify alimony under the terms of the parties' agreements?

II. Did the family court err in reducing alimony or, alternatively, err in reducing alimony by one-half of the original award?

III. Did the family court abuse its discretion in providing for an automatic decrease in alimony nearly two and a half years in the future based on Wife's anticipated eligibility for social security benefits, when such was not requested in Husband's pleadings?

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[5] Wife's appeal of the Final Order and Interim Orders was held in abeyance pending the issuance of the order granting Husband's motion to reconsider.

IV. Did the family court err in granting Husband's motion to reconsider, which was untimely served by mail but timely served by facsimile, and in granting relief, *sua sponte*, under Rule 60(b)(1), SCRCP, more than ten days after entry of the Final Order?

V. Did the family court err in failing to require Husband to pay or contribute to Wife's attorney's fees?

STANDARD OF REVIEW

"The family court is a court of equity." *Lewis v. Lewis*, 392 S.C. 381, 386, 709 S.E.2d 650, 652 (2011). "Article V, § 5 of the South Carolina Constitution provides in relevant part that our appellate jurisdiction in cases of equity requires that we 'review the findings of fact as well as the law.'" *Id.* In appeals from the family court, appellate courts review factual and legal issues de novo. *Simmons v. Simmons*, 392 S.C. 412, 414, 709 S.E.2d 666, 667 (2011). "*De novo* review permits appellate court fact-finding, notwithstanding the presence of evidence supporting the [family] court's findings." *Lewis*, 392 S.C. at 390, 709 S.E.2d at 654–55. "However, this broad scope of review does not require [the appellate court] to disregard the findings of the family court." *Id*. at 384, 709 S.E.2d at 651 (quoting *Eason v. Eason*, 384 S.C. 473, 479, 682 S.E.2d 804, 807 (2009)).

LAW/ANALYSIS

I. Jurisdiction to Modify Alimony

Wife contends the parties' Agreement deprives the family court of subject matter jurisdiction to modify Husband's obligation to pay Wife $8,000 per month of permanent, periodic alimony.

South Carolina Code sections 20-3-130(B)(1) and 20-3-170 (2014) provide the family court subject matter jurisdiction to modify periodic alimony payments. Further, section 20-3-130(G) states in relevant part: "The parties may agree in writing if properly approved by the court to make the payment of alimony as set forth in items (1) through (6) of subsection (B) *nonmodifiable and not subject to subsequent modification by the court*." S.C. Code Ann. § 20-3-130(G) (2014)

(emphasis added). "While the family court normally has the authority to modify alimony, once an alimony agreement that specifically disallows modification is approved by the court and merged into a judicial order, it is binding on the parties and the court and is not subject to modification." *Degenhart v. Burriss*, 360 S.C. 497, 500–01, 602 S.E.2d 96, 97–98 (Ct. App. 2004); *Moseley v. Mosier*, 279 S.C. 348, 353, 306 S.E.2d 624, 627 (1983) ("The parties may specifically agree that the amount of alimony may not ever be modified by the court . . . ."); *Croom v. Croom*, 305 S.C. 158, 161, 406 S.E.2d 381, 383 (Ct. App. 1991)).

In *Degenhart*, the parties executed a written separation agreement in 1999, which was incorporated into their divorce decree following a one-year separation. 360 S.C. at 499, 602 S.E.2d at 97. The agreement stated:

> Husband agrees to pay Wife alimony in the amount of $2,500.00 per month payable on the 1st day of each month beginning with the month of September, 1999 for a period of the earlier of seven years or upon the remarriage of Wife. . . . The provisions of this [agreement] shall not be modified or changed except by mutual consent and agreement of the parties expressed in writing.

Id. The husband initiated an action for termination of his alimony obligation in 2002 based on the wife's cohabitation with another man. *Id.* at 500, 602 S.E.2d at 97. Based on the terms of the agreement and the law of alimony modification, the family court determined it did not have the authority to modify alimony. This court affirmed, holding:

> While this agreement does not expressly state that the family court *cannot* modify the agreement, it is clear and specific about how the agreement *can* be modified, that being "by mutual consent and agreement of the parties expressed in writing." Because the family court "must enforce an unambiguous contract according to its terms regardless of its wisdom or folly, apparent unreasonableness, or the parties' failure to guard their rights carefully, "we see no reason to require "magic words" for an unambiguous agreement to gain efficacy.

> *Lindsay v. Lindsay*, 328 S.C. 329, 340, 491 S.E.2d 583, 589 (Ct. App. 1997). The agreement here, by stating that its terms "shall not be modified or changed except by mutual consent," clearly denies the family court the jurisdiction to modify the agreement by its own authority or at the behest of only one of the parties. Therefore, it was properly enforced.

Id. at 501, 602 S.E.2d at 98.

In *Croom*, this court reversed the modification of an alimony obligation based on a finding of changed circumstances because a clause in the parties' court-approved agreement provided that "the terms and conditions of the agreement and any court order approving it shall not be modifiable by the parties or any court without the written consent of the Husband and Wife." 305 S.C. at 159, 406 S.E.2d at 382.

Wife contends that paragraph D of the Approval, Non-modification and Enforcement Section of the Agreement deprives the family court of subject matter jurisdiction to modify Husband's obligation to pay Wife $8,000 monthly in permanent, periodic alimony pursuant to paragraph B of the Spousal Support Section of the Agreement. We disagree and find paragraph E of the Spousal Support Section permits modification.

Unlike the non-modification provisions in *Croom* and *Degenhart*, it appears that paragraph E of the Spousal Support Section contemplates that alimony could be judicially modified in the future based on a change of circumstance, as long as a period of three years had passed since the family court approved the Agreement. Moreover, the Agreement provides that if Husband's annual total income falls below $500,000, alimony is modifiable even if the three-year period has not passed. Paragraph E goes on to state that if Husband conveys any of his interest in Gilliam & Associates "in any form . . . whatsoever which provides a benefit to [Husband] and which reduces his income to below [$500,000] per year, [Husband] acknowledges that this conveyance shall be subject to review by the Family Court for the Second Judicial Circuit *for the purposes of a reduction of alimony*." (emphasis added). Therefore, we find the possibility of Husband's conveyance of Gilliam & Associates was anticipated by the parties as a potential means for modification of alimony, and the Agreement does not provide a time limitation within which Husband must seek modification if such a sale were to occur.

In 1999, when the family court approved the Agreement, Husband's total annual income was $1,541,081. When Husband filed for modification of alimony in 2010 (well after he disposed of his interest in Gilliam & Associates), his annual income was $83,204. The language of the Agreement demonstrates that what the parties anticipated—namely, that the parties agreed to the court's reconsideration of Husband's alimony obligation if Husband disposed of his interest in Gilliam & Associates and his annual income fell below $500,000—is exactly what occurred. Thus, we find the language of the agreement does not unambiguously deny the family court jurisdiction to modify alimony under such circumstances.

Furthermore, in section III of the Agreement, titled "[Equitable Apportionment]," sub-paragraph A.3 states that Husband agreed to pay Wife $735,000 within ninety days of the Agreement's approval as a portion of her equitable interest in the estate. The payment was to survive Wife's death. Sub-paragraph A.3 goes on to state, "[s]aid payment is not modifiable for any reason and is separate from and in addition to payments of alimony. The Family Court shall not have jurisdiction to modify or terminate this payment for any reason." The Agreement's language is clear and unambiguous that this particular payment could not be modified. Such language is absent from the Spousal Support Section, further demonstrating that the parties did not intend to make alimony forever non-modifiable. Accordingly, we affirm the family court's decision as to its jurisdiction to modify alimony.

II. Reduction of Alimony

Wife further argues that even if the family court had jurisdiction to modify alimony, it erred in reducing alimony or, alternatively, erred in reducing alimony by one-half of the original award from $8,000 to $4,000 per month.

South Carolina Code section 20-3-170 provides, in pertinent part:

> Whenever any husband or wife, pursuant to a judgment of divorce from the bonds of matrimony, has been required to make his or her spouse any periodic payments of alimony and *the circumstances of the parties or the financial ability of the spouse making the periodic payments shall have changed* since the rendition of such judgment, either party may apply to the court which

> rendered the judgment for an order and judgment decreasing or increasing the amount of such alimony payments or terminating such payments and the court, after giving both parties an opportunity to be heard and to introduce evidence relevant to the issue, shall make such order and judgment as justice and equity shall require, *with due regard to the changed circumstances and the financial ability of the supporting spouse,* decreasing or increasing or confirming the amount of alimony provided for in such original judgment or terminating such payments. . . .

S.C. Code Ann. § 20-3-170(A) (2014) (emphases added). "Once a court sets the amount of periodic alimony, that amount may be modified under the guidelines of S.C. Code Ann. § 20-3-170 (1985)." *Fuller v. Fuller*, 397 S.C. 155, 163, 723 S.E.2d 235, 239 (Ct. App. 2012) (citing *Sharps v. Sharps*, 342 S.C. 71, 75, 535 S.E.2d 913, 916 (2000)). In *Fuller*, this court explained:

> To justify modification of an alimony award, the changes in circumstances must be substantial or material. Moreover, the change in circumstances must be unanticipated, and the party seeking modification has the burden to show by a preponderance of the evidence that an unforeseen change has occurred. As a general rule, a court hearing an application for a change in alimony should look not only to see if the substantial change was contemplated by the parties, but most importantly whether the amount of alimony in the original decree reflects the expectation of that future occurrence. Many of the same considerations relevant to the initial setting of an alimony award may be applied in the modification context as well, including the parties' standard of living during the marriage, each party's earning capacity, and the supporting spouse's ability to continue to support the other spouse.
>
> [W]hen a payor spouse seeks to reduce support obligations based on his diminished income, a court

> should consider the payor spouse's earning capacity. Where a payor spouse's actual income compared to his or her earning capacity is at issue, the court must closely examine the payor spouse's good faith and reasonable explanation for the decreased income. However, a payor spouse can be found to be voluntarily underemployed even in the absence of a bad faith motivation.

Id. (citations omitted).

In the case at bar, it is clear that Husband has had a substantial reduction in income since he sold his shares in Gilliam & Associates. However, we question whether this was really an "unanticipated" and "unforeseen change" based on the language of the Spousal Support Section of the Agreement (discussed above). *See Fuller*, 397 S.C. at 163, 723 S.E.2d at 239. From 1998 through 2008, alimony as a percentage of Husband's income has varied—6.80% of his income in 1998; 44.56% of his income in 2003; 5.23% of his income in 2006; 49.96% of his income in 2009; 177.85% of his income in 2010; and 208.37% of his income in 2011.

Husband claims he cannot continue to pay Wife $8,000 a month in alimony and meet his other financial obligations. Husband's most recent financial declaration shows his monthly gross income is $16,070. His monthly payroll deductions are $568, so his net monthly income is $15,502. His monthly expenses total $22,026, which includes $8,000 for spousal support, a $5,282 residential mortgage payment, and $1,531 in taxes and insurance on his residence.

Wife was not working when the case was tried in 2012, and she had not worked for the previous twenty-three years. Wife attended Winthrop University for less than two years, where she majored in elementary education; she neither obtained her degree nor has she ever taught school. When Wife last worked as a secretary in 1989, computers were not common. She testified at trial that she is not computer savvy and does not have a personal email. In order to return to the workforce as a secretary, Wife would likely have to go back to school and receive additional training. However, Wife testified that she has not looked for a job since 1999. We, like the trial court, are concerned that $8,000 in alimony per month has served as a disincentive for Wife to improve her employment potential.

Excluding alimony, Wife's financial declaration showed $154 in gross monthly income from dividends and interest. Wife's financial advisor testified Wife could draw $1,322.63 per month from an annuity and that she was eligible to take distributions from her IRA; however, he advised her not to do so based on her life expectancy. If Wife received no alimony and liquidated her approximately $838,000 in assets,[6] she estimated the money would last approximately seven years at her current rate of a little over $5,000 in monthly expenses. Based on the originally agreed upon $8,000 per month in alimony, Wife's deductions reflected in her financial declaration (including taxes, health insurance, life and long-term care insurance, and retirement) totaled $3,151 per month, resulting in a net income of $5,003 per month. Wife testified that her expenses were $5,293 per month, including $550 per month for anticipated loan payments on a new car to replace her 2003 Toyota 4-Runner that had 158,400 miles and needed major repairs, and a $626 payment for maintenance of her household.[7]

Based on the foregoing, we agree with Wife's argument that the family court abused its discretion in reducing alimony from $8,000 to $4,000. It is clear from the record, however, that Husband has had a substantial reduction in income since selling his shares in Gilliam & Associates. Thus, we find a reduction from $8000.00 to $6000.00 per month to be more appropriate based upon the circumstances of this case and the parties' respective financial positions. Such a reduction is fair and in keeping with the loss of income Husband established due to the sale of his company shares.

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[6] In its Final Order, the family court pointed out that Wife failed to include liquid assets of approximately $105,000 in life insurance cash value on her financial declaration. In Wife's appellate brief, she states that these funds were inadvertently omitted from the $733,374 total value of Wife's property listed on her financial declaration submitted at trial. The life insurance cash value appeared on her financial declaration dated August 18, 2010. Wife testified she was not trying to deceive the court and that the omission was an oversight, which was corroborated by her financial advisor.

[7] Wife testified that $626 per month for household maintenance was higher than usual because she had to replace the roof, all of the windows, and several walls and had to have work done on her kitchen and a bathroom due to a mold and mildew problem.

III. Anticipated Eligibility for Social Security

Wife further argues that if the family court had jurisdiction to modify alimony, it abused its discretion in providing for an automatic decrease in alimony almost two and a half years in the future based on Wife's anticipated eligibility to receive social security benefits. Wife additionally contends Husband did not plead for a reduction of alimony on this ground. We find this issue is preserved; however, we agree that the family court erred in reducing alimony based on Wife's future anticipated benefits eligibility.

"It is axiomatic that an issue cannot be raised for the first time on appeal, but must have been raised to and ruled upon by the trial judge to be preserved for appellate review." *Atl. Coast Builders & Contractors, LLC v. Lewis*, 398 S.C. 323, 330, 730 S.E.2d 282, 286 (2012) (citation omitted).

In his amended complaint, Husband alleged:

> Additionally, [Wife] is or soon will be of age to draw down on her own retirements and she is or soon will be able to obtain Social Security, based on [Husband's] earnings, all of which will increase [Wife's] income, while at the same time, her expenses have reduced. [Husband] would further allege that, particularly combined with his substantial reduction in income, these circumstances support a dramatic reduction (or even termination) in his alimony obligation and he would ask that this [c]ourt issue an Order allowing the same . . . .

In response, Wife filed an amended answer and counterclaims in which she denied these allegations. At trial, Husband testified and pled that in addition to asking for a reduction in alimony to $4,000 per month, he also wanted the judge to include in the Final Order that alimony would be reduced when Wife became eligible for social security. Wife's lawyer did not object to this testimony; however, he did cross-examine Husband about this request:

> Q: Okay. Now, about done. Yesterday, you were asked by Mr. O'Connell how you wanted to see this case shake out, and you said reduce my alimony to [$4,000], less

> Social Security when [Wife] is able to get it; is that correct?
>
> A: That was what I said.
>
> Q: Okay. Social Security for either you or Cathy was on the books in a law back in 1999, wasn't it?
>
> A: I don't know.
>
> Q: Social Security has been around since the '40's, hadn't it?
>
> A: Social Security has. I don't know about individual laws of Social Security, no.
>
> Q: Okay. But if it was a law then, you're presumed to know it; wouldn't you agree?
>
> A: No sir.

Wife introduced testimony at trial on the issue of the automatic reduction of her alimony based on the amount of social security she would be eligible to receive when she turned sixty-two. Wife was questioned by Husband's attorney and by her own attorney on the issue.

"Questions concerning alimony rest within the sound discretion of the family court judge whose conclusion will not be disturbed absent a showing of abuse of discretion." *Degenhart*, 360 S.C. at 500, 602 S.E.2d at 97 (citing *Bryson v. Bryson*, 347 S.C. 221, 224, 553 S.E.2d 493, 495 (Ct. App. 2001); *Bannen v. Bannen*, 286 S.C. 24, 26, 331 S.E.2d 379, 380 (Ct. App. 1985)). "An abuse of discretion occurs when the decision is controlled by some error of law or is based on findings of fact that are without evidentiary support." *Id.* at 500, 602 S.E.2d at 97 (citing *Bryson*, 347 S.C. at 224, 553 S.E.2d at 495; *McKnight v. McKnight*, 283 S.C. 540, 543, 324 S.E.2d 91, 93 (Ct. App. 1984)).

The Final Order provides:

> According to his income projections, $200,277.71 is the maximum annual income [Husband] will have for the remainder of his life. In the year 2020, his projected income will be $150,996.18. Annual alimony of $48,000 is 32% of this 2020 income. His projected income for the year 2024 is $116,652. Alimony of $48,000 per year is 41% of this amount. Given these projections, this Court also believes it is appropriate that [Wife's] alimony should be further reduced by the amount of Social Security for which she will become eligible at age 62, without regard to whether [Wife] applies for or actually receives Social Security benefits. Reducing [Husband's] alimony by the amount of Social Security for which [Wife] will be eligible will ease the financial burden on [Husband]. For example, in 2024, if [Wife's] Social Security benefit is $11,000 per year, [Husband's] alimony obligation would be $36,900 per year. This would represent about 32% of his projected income instead of 41%. This adjustment is infinitely fair.

Wife cites several cases holding that it is error for the family court to order increases or decreases in alimony based on future events. In *Prince v. Prince*, 285 S.C. 203, 328 S.E.2d 664 (Ct. App. 1985), our court reversed the family court's automatic decrease in alimony, stating, "It is not known what conditions may exist in six or twelve months; future conditions could call for either an increase or a decrease in the award." *Id.* at 205, 328 S.E.2d at 666. In support of its holding, this court quoted *Shafer v. Shafer*, 283 S.C. 205, 320 S.E.2d 730 (Ct. App. 1984), in which a child support award providing for an automatic increase after one year was reversed: "By providing for an automatic increase in child support, the trial judge arbitrarily increased the amount of support without a showing of a change of conditions." *Prince*, 285 S.C. at 205, 328 S.E.2d at 665–66 (citing *Shafer*, 283 S.C. at 209, 328 S.E.2d at 733). Wife also cites *Sharps*, in which our supreme court held that "[b]ecause a court cannot always know what conditions will exist in the future, it would be arbitrary to automatically increase alimony or child support in the far distant future based on the happening of anticipated events." 342 S.C. at 77, 535 S.E.2d at 916. While we acknowledge that these cases differ from the case at hand, they are helpful to our analysis.

Under the present law of the United States, citizens are able to collect Social Security at age sixty-two. This is not a highly speculative future event. Under the terms of the Final Order, even if Congress were to change the law to increase the age for Social Security eligibility, Wife's alimony would not decrease until she is actually eligible to collect Social Security.

Regardless, we find the family court abused its discretion in providing for an automatic decrease in alimony almost two and a half years in the future based on Wife's anticipated initial eligibility for social security benefits at age sixty-two. *See, e.g.*, *Crossland v. Crossland*, 408 S.C. 443, 453, 759 S.E.2d 419, 424 (2014) (discussing social security benefits a spouse is actually receiving as opposed to "future, yet-unclaimed social security benefits").[8] We are further concerned that the family court based its decision on Husband's income projections and anticipated loss of income—factors already considered in the court's decision to reduce Husband's monthly alimony obligation.[9]

IV. Rules 5(b)(1) and 60(b)(1), SCRCP

Wife further asserts that the family court erred in granting Husband's motion to reconsider because the motion was untimely served by mail and ineffectively served by facsimile. Specifically, Wife contends the family court erred in granting the motion sua sponte under Rule 60(b)(1), SCRCP, more than ten days after entry of the Final Order. We agree in part, but affirm in light of the parties' stipulation (discussed below) that Wife's counsel actually received the fax within the ten-day service period.

"A motion to alter or amend the judgment shall be served not later than 10 days after receipt of written notice of the entry of the order." Rule 59(e), SCRCP; *accord* Rule 52(b), SCRCP (similarly providing that a motion to amend a judgment

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[8] Nothing in this opinion should be construed as prohibiting the family court from considering at an appropriate hearing any social security benefits Wife is actually receiving once she elects to receive such benefits.

[9] Of additional concern is the family court's decision to reduce Husband's alimony obligation by the amount of social security benefits for which Wife would become *eligible* at age sixty-two, even if she chose to defer receiving these benefits beyond her initial eligibility date.

must be made "not later than 10 days after receipt of written notice of entry of judgment . . . ."); *see also Diamond Jewelers, Inc. v. Naegele Outdoor Advert. Co.*, 290 S.C. 260, 349 S.E.2d 888 (1985) (requiring post-trial motions filed under Rules 52(b) and 59(e), SCRCP, to be served not later than ten days after receipt of notice of entry of the judgment).

> Whenever under these rules service is required or permitted to be made upon a party represented by an attorney the service shall be made upon the attorney unless service upon the party himself is ordered by the court. Service upon the attorney or upon a party shall be made by delivering a copy to him or by mailing it to him at his last known address or, if no address is known, by leaving it with the clerk of court. Delivery of a copy within this rule means: handing it to the attorney or to the party; or leaving it at his office with his clerk or other person in charge thereof; or, if there be no one in charge, leaving it in a conspicuous place therein; or, if the office is closed or the person to be served has no office, leaving a copy at his dwelling place or usual place of abode with some person of suitable age and discretion then residing therein. Service by mail is complete upon mailing of all pleadings and papers subsequent to service of the original summons and complaint.

Rule 5(b)(1), SCRCP.

The Final Order was filed on November 30, 2012. On December 12, 2012, Husband served Wife's counsel with a motion to reconsider via facsimile. In his motion, Husband asked the family court to retroactively reduce his monthly alimony in the amount of $4,000 to September 12, 2011 (the date that the original trial was scheduled to begin). On December 27, 2012, the family court sent instructions for an order granting Husband's motion to counsel for both parties via facsimile, and directed counsel for Husband to draft an order consistent with the instructions. Husband's counsel submitted his proposed order via email to the family court and counsel for Wife on January 2, 2013. The court granted Husband's motion to reconsider by order signed on January 3, 2013, and filed on January 14, 2013.

On January 22, 2013, Wife filed a motion to reconsider, in which she asked the family court to alter, amend, modify, stay, vacate, or grant relief from its January 14, 2013 order. Wife asserted three grounds for the motion: (1) Husband's motion was untimely because it was not received by mail by the Wife until December 27, 2012, and therefore, was procedurally barred; (2) Husband's service by facsimile on December 12, 2012, was ineffective; and (3) Wife was not given an opportunity to be heard on Husband's motion. In support of her motion, counsel for Wife, H. Grady Brown (Brown), submitted an affidavit. In his affidavit, Brown stated "[Husband's] [m]otion initially was transmitted to me via facsimile on December 12, 2012 . . . ." Brown also stated that the motion to reconsider arrived by mail at his office on December 27, 2012. This information was also provided to the family court by way of stipulation on September 26, 2013. The parties stipulated, "To the best of [Brown's] recollection, he saw and reviewed the fax of [Husband's] [m]otion on December 12, 2012."

On February 2, 2013, Husband filed and served his return to Wife's January 23, 2013 motion. Husband asserted that his motion to reconsider was timely, effectively, and actually served and filed, and therefore, was not procedurally barred. On February 20, 2013, the family court issued an order allowing Wife to respond to Husband's motion and staying his January 14, 2013 order. Wife did so on March 4, 2013. Ultimately, the family court held that Husband believed he had timely delivered the motion in an appropriate manner, as he stamped the fax copy with the words "Certificate of Service", signed it, and dated it December 12, 2012.

In *Trowell v. South Carolina Department of Public Safety*, "this court declined to hold that the facsimile of an agency's final decision regarding an employee grievance constituted proper service for the purpose of initiating the time frame in which the employee had to file his appeal." *White v. S.C. Dep't of Health & Envtl. Control*, 392 S.C. 247, 253, 708 S.E.2d 812, 815 (Ct. App. 2011) (citing *Trowell*, 384 S.C. 232, 235–37, 681 S.E.2d 893, 895–96 (Ct. App. 2009). In *Trowell*, Scott Trowell, a highway patrolman, was suspended without pay for forty hours and reassigned to a different patrol unit. *Trowell*, 384 S.C. at 233, 681 S.E.2d at 894. Trowell filed a grievance with the Department of Public Safety (the Department). *Id.* Notice of the Department's decision upholding the suspension was initially sent to Trowell's attorney by fax on February 2, 2005, with a notation indicating the decision would also be sent by certified mail. *Id.* at 234, 681 S.E.2d at 894. Trowell's attorney received the Department's decision by certified mail on February 7, 2005. *Id.* at 234, 681 S.E.2d at 894–95.

> Trowell's counsel admit[ted] the facsimile was received by his office on February 2; however, because facsimiles are not ordinarily used to accomplish notice of a decision by any department, agency, or court, counsel maintain[ed] he did not look at or consider the fax until the certified copy of the letter was received by his office on February 7, at which time he began the next step of the appeals process.

Id. at 237, 681 S.E.2d at 896. On February 15, 2005, Trowell's attorney faxed an appeal from the Department's decision to the Human Resource Management Division of the South Carolina Budget and Control Board (Human Resources). *Id.* at 234, 681 S.E.2d at 895. "On March 4, 2005, [the director of Human Resources] notified Trowell, via letter, that his appeal was untimely because Trowell had failed to file it within ten calendar days of receipt of [the Department's] February 2 facsimile, pursuant to section 8-17-330 of the South Carolina Code (Supp. 2008)." *Id.*

The *Trowell* court noted, "the agency's interpretation of its grievance procedure . . . created a rule which it had, admittedly, never before employed or sought to enforce. Moreover, the rule that the time for an appeal began to toll upon service by facsimile is not included in any written materials or guidelines available to the public or the bar." *Id.* at 236–37, 681 S.E.2d at 896. This court further observed that the Department's decision "arbitrarily created a trap for the unwary petitioner. As a result, we believe the substantial rights of Trowell were prejudiced due to the arbitrary and capricious nature of the agency's interpretation of its grievance procedure." *Id.* at 237, 681 S.E.2d at 896.

In *Dill-Ball Company v. Bailey*, 103 S.C. 233, 87 S.E. 1010 (1916), a sheriff's agent placed suit papers in the defendant's mailbox; the defendant's servant removed them and later handed them to the defendant. *Id.* at 1011. The defendant acknowledged to the sheriff that he had received the papers from his servant, and the sheriff told him what the papers were regarding. *Id.* Although there was no proper re-service, the court held that service was effective. *Id.*; *see also Humphries v. Spitz*, 284 S.C. 521, 523, 327 S.E.2d 370, 371 (Ct. App. 1985) (providing the same ruling, citing *Dill-Ball* as authority).

Actual and timely service defeats any claim that service was not in accordance with the Rules. We note that Rule 5(b)(1), SCRCP, neither authorizes nor

prohibits delivery of a written notice by facsimile. However, the crux of the Rule is for the movant to deliver a copy to opposing counsel. Here, the record, including Brown's affidavit and the parties' stipulation, reflects that Husband's motion was timely and actually received by Brown's office on December 12, 2012, within the meaning and intent of Rule 5(b)(1), SCRCP. Unlike the facts in *Trowell*, Wife's counsel did not claim that he took no action to oppose Husband's motion because he considered service by facsimile on December 12, 2012 to be ineffective. We believe that if Wife's counsel had considered the service by facsimile ineffective on December 12, 2012, he would have filed a motion with the family court when he received the court's instructions for its order on December 27, 2012, or when he received the proposed order on January 2, 2013. Wife's counsel made no complaint about untimely or improper service until filing her January 22nd motion.[10]

V. Attorney's Fees

Wife argues the family court erred in failing to require Husband to pay or contribute toward her litigation fees and costs. We agree.

"In determining whether an attorney's fees should be awarded, the following factors should be considered: (1) the party's ability to pay his/her own attorney's fee; (2) the beneficial results obtained by the attorney; (3) the parties' respective financial conditions; and (4) the effect of the attorney's fees on each party's standard of living." *E.D.M. v. T.A.M.*, 307 S.C. 471, 476–77, 415 S.E.2d 812, 816 (1992) (citation omitted). In determining the amount of reasonable attorney's fees, the family court should consider: "(1) the nature, extent, and difficulty of the case; (2) the time necessarily devoted to the case; (3) professional standing of counsel; (4) contingency of compensation; (5) beneficial results obtained; and (6) customary legal fees for similar services." *Glasscock v. Glasscock*, 304 S.C. 158, 161, 403 S.E.2d 313, 315 (1991).

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[10] We agree with Wife that it was error for the family court to invoke Rule 60(b) on its own initiative. *See* Rule 60(b), SCRCP (stating that "*on motion* and upon such terms as are just" the court may relieve a party or its legal representative from a final judgment or order in certain limited situations) (emphasis added)). However, the Rule 59(e) ruling—as well as the parties' stipulation that Wife's counsel "saw and reviewed" the faxed motion within the 10-day period—is dispositive on the timeliness question.

Here, both parties sought attorney's fees in their pleadings. At trial, counsel for Wife submitted an affidavit for attorney's fees incurred during the course of litigation. Pursuant to the affidavit, Wife incurred $64,670.71 in attorney's fees, which included an estimate of an additional forty-five hours for the fees and costs estimated to be incurred during the week of trial. Wife's counsel stated her hourly rate was $200, and she spent approximately 232 hours, with some time billed by her paralegal at seventy-five dollars per hour, defending Wife's case. In addition, Wife spent approximately $21,000 in out-of-pocket costs for depositions, appraisals, and other materials, and she paid $12,000 to a financial advisor expert who provided litigation support. Wife's fees and costs total approximately $97,670.

Notwithstanding the fact that Wife was awarded $2,000 in temporary attorney's fees in connection with a motion to reopen discovery filed by Husband, the family court ordered both parties to pay their own attorney's fees. The family court concluded that the attorney's fees incurred by each party were reasonable and necessary:

> This [c]ourt has reviewed the affidavits of counsel for both parties. They have documented their services adequately and it appears that the attorneys' fees both have requested are appropriate. The [c]ourt considered statutory and case law of the State, including but not limited to *Glasscock v. Glasscock* and *E.D.M. v. T.A.M.*, as well as the factors set forth in the Code of Professional Responsibility. This [c]ourt approves the fees that both attorneys charged their clients.
>
> This [c]ourt has further reviewed documentation of the negotiations between the parties and their attempt to resolve this matter prior to [t]rial. They came very close to being able to resolve this matter without the necessity of litigation. It appears that litigation was necessary in this matter. It appears there is give and take by each party in their efforts to resolve this between themselves. Based on these findings [it] is appropriate for each party to assume their own legal fees and costs.

Although the weight of the beneficial results obtained initially weighed in Husband's favor, the parties' abilities to pay, their respective financial conditions, and the effect of attorney's fees on each party's standard of living supported Wife's fee application. We recognize that "the threshold question of entitlement [to fees] always turns, at least in part, on the beneficial results obtained." *Buist v. Buist*, 410 S.C. 569, 579, 766 S.E.2d 381, 386 (2014) (Pleicones, C.J., concurring). Where beneficial results are reversed on appeal, the attorney's fee award, or lack thereof, must also be reconsidered. *See Crossland*, 408 S.C. at 460, 759 S.E.2d at 428; *Rogers v. Rogers*, 343 S.C. 329, 540 S.E.2d 840 (2001) ("[S]ince the beneficial result obtained by counsel is a factor in awarding attorney's fees, when that result is reversed on appeal, the attorney's fee award must also be reconsidered.").

Rule 26(a), SCRFR, requires that "[a]n order or judgment pursuant to an adjudication in a domestic relations case shall set forth the specific findings of fact and conclusions of law to support the court's decision." Here, the family court's order does not satisfy Rule 26(a) and is insufficient to support its reason for declining to award Wife attorney's fees; however, we find it unnecessary to remand the fee question because the record is sufficient for this court to make its own findings. *See Holcombe v. Hardee*, 304 S.C. 522, 524, 405 S.E.2d 821, 822 (1991) ("[W]hen an Order is issued in violation of Rule 26(a), [an appellate court] may remand the matter to the trial court or, where the record is sufficient, make its own findings of fact in accordance with the preponderance of the evidence.").

Here, Husband was in a better financial position to pay his own attorney's fees and to contribute toward a substantial portion of Wife's fees. Husband's net worth increased from approximately $1 million at the time of the divorce to $3.3 to $3.4 million at the time of the alimony modification trial. During that same period, Wife's net worth decreased from approximately $1 million to $837,437, and she had redeemed a total of $86,651 from her investments to pay her litigation expenses. Husband also liquidated assets and drew from an equity line in the months prior to trial, both to pay his litigation costs and to retire certain debts. Of the $547,000 in this available cash, he retired some $300,000 in debt, including $150,000 in attorney's fees. There was no explanation regarding the expenditure of the remaining $247,000. Wife's financial declaration for trial reflected some $3,000 in her checking account, while Husband had a combined balance of over $26,000 in his checking accounts.

In light of the beneficial results obtained by Wife on appeal, the parties' respective financial conditions and abilities to pay their litigation expenses, as well as the effect that paying attorney's fees will have on each party's standard of living, we find it appropriate for Husband to pay $48,835.00 (one-half) of Wife's attorney's fees and costs.

CONCLUSION

For the reasons set forth above, we affirm the family court's finding that it had jurisdiction to modify the alimony award, but we modify the family court's alimony reduction. We find a reduction from $8000.00 to $6000.00 per month to be appropriate based upon the circumstances of this case and the parties' respective financial positions. We reverse the automatic decrease in alimony based on Wife's anticipated initial eligibility for social security benefits at age sixty-two. Finally, we reverse the family court's decision as to attorney's fees, and find Husband shall contribute $48,835.00 toward payment of Wife's attorney's fees and costs.

Accordingly, the orders of the family court are **AFFIRMED IN PART** and **REVERSED IN PART**.

LOCKEMY, C.J., and SHORT, J., concur.

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

Lori Dandridge Stoney, Appellant,

v.

Richard S.W. Stoney Sr., Defendant/Respondent,

and Theodore D. Stoney Jr., Third-Party Intervenor/Respondent.

Appellate Case No. 2011-203410

Appeal From Orangeburg County
Peter R. Nuessle, Family Court Judge

Opinion No. 5431
Heard November 12, 2014 – Filed July 27, 2016

REVERSED AND REMANDED

J. Michael Taylor, of Taylor/Potterfield, and Peter George Currence, of McDougall & Self, LLP, both of Columbia, for Appellant.

Charles H. Williams, of Williams & Williams, of Orangeburg, for Respondent Theodore D. Stoney Jr.

Donald Bruce Clark, of Donald B. Clark, LLC, of Charleston, and James B. Richardson Jr., of Columbia, for Respondent Richard S.W. Stoney Sr.

MCDONALD, J.: In this marital litigation, Lori Dandridge Stoney (Wife) contends the family court erred in (1) permitting Theodore D. Stoney Jr. (Brother) to intervene or, in the alternative, failing to control the extent of this intervention; (2) denying Wife's motion to reopen on the basis of newly discovered evidence; (3) imputing income of only $100,000 per year to Richard S.W. Stoney Sr. (Husband); (4) failing to award Wife alimony; (5) failing to make a proper child support determination; (6) failing to require that Husband maintain life insurance/other security; (7) erroneously apportioning the marital property in several respects; (8) failing to find Wife has a special equity in certain businesses; (9) declining to hold Husband in contempt; (10) failing to grant Wife a divorce on the ground of adultery; and (11) failing to award Wife attorney's fees. We reverse and remand for a new trial.

FACTUAL BACKGROUND

On October 12, 1996, Husband and Wife married in Berkeley County. Prior to the marriage, the parties entered into a prenuptial agreement.[1] The parties have one child together (Child).[2]

At the beginning of the marriage, Husband and Wife practiced law together; however, Wife began her own practice in 1997. Around this time, the parties opened a restaurant called the Boathouse at Breach Inlet (BHBI)[3] on the Isle of

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[1] Husband produced neither the original nor a signed copy of the prenuptial agreement; however, he did include a copy of an unsigned prenuptial agreement as an exhibit to his affidavit.

[2] Child was nine-years-old when this case was filed and twelve at the time of trial.

[3] At the date of filing, the ownership structure of BHBI was as follows:

Husband—70%
Brother—10%
Wife—5%
Richard Stoney Jr. (in Trust)—5%
Child (in Trust with Wife as Trustee)—5%

Palms, and Husband eventually stopped practicing law to focus on the restaurant. Wife's practice of law also became subordinate to the family's needs and operation of the parties' business ventures.[4]

BHBI was very successful from the time it opened, and it became the source from which Husband financed his other ventures. Husband purchased four other restaurants and various businesses during the course of the marriage, making "loans" from BHBI to the new entities. These businesses were managed by Husband's company, Crew Carolina.

The couple's second restaurant was the Boathouse at East Bay Street (BHEB) in downtown Charleston. Although BHEB broke even, Husband closed the restaurant in January 2009. As of December 31, 2008, BHEB had a net asset value of negative $141,048. Husband and Brother jointly owned the real property on which BHEB was located.[5]

In 2003, the couple opened the Boathouse at Lake Julian (BHLJ) in Asheville, North Carolina, which closed in July 2008. As of December 31, 2008, BHLJ had a net asset value of negative $1,297,939, which included an allocation of $474,792.78 of a Carolina First/DI Carolinas consolidation loan. In 2004, the couple purchased Carolinas, an existing restaurant located on Exchange Street in downtown Charleston, which they subsequently renovated. As of December 31, 2008, Carolinas had a net asset value of $89,539. Husband sold Carolinas[6] in

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Lawrence Stoney—5%

[4] The parties stipulated that Wife assisted Husband in the operation of the couple's restaurants and businesses.

[5] The property was later reopened as another restaurant.

[6] After Wife discovered the impending sale of Carolinas, she filed a motion for protection, which resulted in a February 17, 2011 order requiring that Brother's attorney hold in escrow the remaining proceeds and any funds still in escrow. At trial, Wife testified that she had received nothing from the sale of Carolinas.

January 2010 for over $550,000.[7] Additionally, Husband advanced funds and assisted a third-party with opening Choto, a restaurant in Knoxville, Tennessee.[8]

In February of 2009, the parties opened their final restaurant, the Boathouse at Ellis Creek (BHEC), which burned to the ground one month later. Husband received over $850,000 in insurance proceeds during the first year the parties were separated; however, he did not use this money to rebuild the restaurant.[9] Instead, these funds were used to satisfy obligations to other creditors and business partners. This account was drained by the time of trial. In his testimony, Husband explained, "every dime that I received for Ellis Creek was used to offset the massive amount of debt we had, and I believe that the forensic accountants have well covered that fact. . . . I am doing everything I can to rebuild Ellis Creek." Throughout the trial, Husband referred to "robbing Peter to pay Paul" to keep creditors at bay and allow certain businesses to continue operating.

Husband started three additional businesses shortly after Wife filed for divorce: Amen Street Fish & Raw Bar, J & S Fish, LLC, and Rice Market.

PROCEDURAL BACKGROUND

On April 23, 2009, Wife filed an action for divorce seeking sole custody of Child, child support, alimony, equitable division, and other relief. By consent order dated May 15, 2009, the family court approved a change of venue from Charleston

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[7] The majority of the sale price was paid up front to Husband; however, the buyer gave Husband a note, $75,000 of which was paid off prior to trial. Husband stipulated at trial that he paid one of his business partners, Thomas Westfeldt, $270,000 from these proceeds, which reduced a $550,000 note held by Westfeldt. The remainder of this note is secured by the Isle of Palms property.

[8] Husband has obtained summary judgment and an award of $250,000 against Choto's owner; however, the collection of this sum had not yet occurred as of the date of oral argument. The family court did not address this judgment in its final order.

[9] The property has since reopened as another restaurant.

County to Orangeburg County. That same day, the family court approved a consent order sealing the record.

On June 18, 2009, Husband filed an answer and counterclaim, seeking joint custody of Child, enforcement of a prenuptial agreement, equitable division of the marital property and debt, and certain other relief. In addition, Husband sought the imputation of income to Wife and to pay reasonable child support pursuant to the South Carolina Child Support Guidelines.

On July 10, 2009, Wife filed a reply and counterclaim, admitting she had signed a prenuptial agreement, but alleging it had been lost. On this same date, the Honorable Anne Gue Jones entered a temporary order. This temporary order adopted an agreement titled, "Consent Order Regarding Certain Child Issues," which, among other things, awarded custody to Wife and prohibited Husband from exposing Child to his paramours. The other issues raised remained contested. The court granted Wife exclusive use and possession of the couple's condominium in Charleston, and required Husband to pay Wife approximately $22,000 per month for Wife and Child's expenses. On February 26, 2010, a supplemental temporary order was issued, relieving Husband of certain obligations required by the July 10, 2009 temporary order.

On January 5, 2010, Brother filed a motion to intervene to protect his interests in certain real property, business concerns, and debts he asserts he is owed. The court granted Brother's motion to intervene by order dated February 22, 2010, finding "[Brother]'s interest in this action outweighs any privacy interest that [Wife] asserts. . . . [T]he interests of [Brother] and the property which is the subject of this action cannot be adequately protected because of the [Husband]'s tenuous financial condition."

On March 4, 2010, Brother filed a third-party complaint, requesting, among other things, a determination by the court that his loans to Husband (and to the parties on behalf of Husband) constituted marital debt. Husband answered Brother's complaint on March 4, 2010, admitting all of Brother's claims and joining in the relief sought by Brother. Wife answered on March 29, 2010, asserting that she had insufficient information to admit or deny the allegations. On August 2, 2010, the family court issued a consent order relieving Husband's counsel. From this point through the two-week trial, Husband acted pro se.

During the pendency of this action, Husband was held in willful contempt with regard to four petitions and one supplemental petition for rules to show cause, and an additional rule remains unresolved. Specifically, Wife initially filed two petitions for rules to show cause (Rule 1 and Rule 2a), and a supplemental petition (Rule 2b). Rule 1, Rule 2a, and Rule 2b were resolved by order dated February 25, 2010, in which the family court found Husband in willful contempt for failing "to make payments under the Temporary Order, while he had funds to pay for other personal expenses on his behalf."

Wife filed a third rule to show cause (Rule 3) against Husband on January 11, 2010, regarding a criminal domestic violence situation involving Brother and Husband that resulted in physical injury to Wife in Child's presence. On March 29, 2010, the family court found Husband to be in willful contempt. Additionally, the court required counseling for Husband and Child, appointed a parenting coordinator, and authorized Wife to tape her phone conversations with Husband.

Wife filed two additional petitions for rules to show cause (Rule 4 and Rule 5). In Rule 4, issued on June 29, 2010, Wife alleged that Husband failed to pay her regime fees, Wife and Child's uncovered medical/dental expenses, Child's private school expenses, and certain credit card obligations. In Rule 5, issued on October 8, 2010, Wife alleged Husband exposed Child to his paramour in violation of a specific restraining order.[10] Both Rule 4 and Rule 5 were resolved by order dated January 6, 2011, in which the family court again held Husband in willful contempt. Husband was sentenced to ninety days, suspended upon payment of the required expenses mentioned above, as well as a payment of $3,000 in attorney's fees to Wife's counsel.

Several motions, including Husband's January 25, 2011 motion to declare contempt purged, were resolved by order dated March 24, 2011. In the March 24th order, the family court accepted Wife's agreement that Husband could purge his contempt sentence, based upon his assertion that he had made arrangements for support payments, as well as Husband's payment of the $3,000 in attorney's fees previously

[10] The family court found Husband "knowingly, willfully and even defiantly exposed the minor child to his paramour and has shown a blatant disregard" for the consent order.

ordered. In that same order, the court denied Husband's motion to sell or pledge up to ten percent of his interest in BHBI as well as Wife's motion to either purchase BHBI or be awarded complete control over the day-to-day operations of the business. In a separate order, the family court required Husband and Wife to each contribute $5,000 toward a joint court-appointed CPA by March 25, 2011.

The two-week trial was held March 28–April 1, 2011, and May 23–27, 2011. When the trial started, Wife had complied with her $5,000 obligation to the CPA, but Husband had not. Wife filed another petition for rule to show cause (Rule 6) on May 10, 2011, alleging Husband had failed to pay the previously ordered CPA fees and attorney's fees.[11] Despite Wife's requests, these contempt issues were never resolved. On June 17, 2011, after the trial concluded, but before the final order was issued, Wife filed a motion to reopen the case based on newly discovered evidence.

On July 18, 2011, the family court entered an interim order, addressing the divorce only. Despite Wife's request for a divorce on the ground of adultery, the court granted dissolution on the ground of one year's continuous separation. On September 22, 2011, Wife moved to alter or amend the interim order pursuant to Rules 52, 59, and 60, SCRCP, and Rule 2(a), SCRFC. The family court denied this motion by order dated October 15, 2011. Wife appealed on November 18, 2011.

On July 25, 2011, the family court emailed counsel for Brother, requesting that he submit two proposed orders to the court: one order denying Wife's motion to reopen and another setting out the trial court's final order in the case on all remaining issues. Instead, Brother's counsel drafted a single order (Final Order), incorporating both the family court's denial of Wife's motion to reopen as well as its rulings on the remaining property and support issues.

Upon receipt of the Final Order, Wife's counsel emailed and wrote the family court and opposing counsel, requesting an opportunity to respond to Brother's proposed order. However, the family court ignored this request and without making any changes to Brother's submitted proposed order, the court issued its Final Order on September 6, 2011.

[11] Husband has not appealed this order of contempt.

On September 22, 2011, Wife timely filed a motion to alter or amend the Final Order, which the family court denied by order dated November 30, 2011. Wife appealed that Final Order on January 6, 2012. The two appeals have subsequently been consolidated.

ISSUES ON APPEAL

I. Did the family court err in allowing Brother to intervene and in failing to control the extent of Brother's intervention?

II. Did the family court err in denying Wife's motion to reopen the case as a result of newly discovered evidence?

III. Did the family court err in imputing income of only $100,000 per year to Husband?

IV. Did the family court err in failing to award Wife alimony?

V. Did the family court err in its child support determination?

VI. Did the family court err in failing to require Husband to maintain life insurance and other security for alimony and child support?

VII. Did the family court err in identifying, valuing, and apportioning marital assets and debts?

VIII. Did the family court err in failing to find Wife has a special equity in businesses funded with marital funds by Husband after the date of filing?

IX. Did the family court err in failing to hold Husband in contempt?

X. Did the family court err in failing to grant Wife a divorce on the ground of adultery?

XI. Did the family court err in failing to award Wife attorney's fees and litigation costs?

STANDARD OF REVIEW

"The family court is a court of equity." *Lewis v. Lewis*, 392 S.C. 381, 386, 709 S.E.2d 650, 652 (2011). In appeals from the family court, the appellate court reviews factual and legal issues de novo. *Simmons v. Simmons*, 392 S.C. 412, 414, 709 S.E.2d 666, 667 (2011). "De novo review permits appellate court fact-finding, notwithstanding the presence of evidence supporting the trial court's findings." *Lewis*, 392 S.C. at 390, 709 S.E.2d at 654–55 (emphasis omitted). "However, this broad scope of review does not require an appellate court to disregard the factual findings below or ignore the fact that the trial judge is in the better position to assess the credibility of the witnesses." *Pinckney v. Warren*, 344 S.C. 382, 387, 544 S.E.2d 620, 623 (2001). "Moreover, the appellant is not relieved of his burden of convincing the appellate court the trial judge committed error in his findings." *Id*. at 387–88, 544 S.E.2d at 623. Accordingly, we will affirm the decision of the family court unless its decision is controlled by some error of law or the appellant satisfies the burden of showing the preponderance of the evidence actually supports contrary factual findings by this court. *See Lewis*, 392 S.C. at 389–90, 709 S.E.2d at 654–55.

LAW/ANALYSIS

I. Brother's Intervention

Wife argues persuasively that the family court erred in its Final Order and decree of divorce on a number of bases. According to Wife, most problematic was "the trial court's surrender to the dictates of Husband's brother, the Third Party Intervenor, whose control was so great that the trial court instructed his attorney to prepare the Final Order in the case, then [signed] that order with no changes whatsoever and without allowing Wife's attorneys any input." (footnote omitted).

Wife contends the family court erred in allowing Brother to enter, and essentially control, the litigation. We agree and hold that even if the family court did not abuse its discretion in permitting intervention, the degree to which the court permitted Brother's counsel to involve himself in matters wholly unrelated to those in which Brother had a purported interest was certainly erroneous.

"The decision to grant or deny a motion to join an action pursuant to Rule 19, SCRCP, or intervene in an action pursuant to Rule 24, SCRCP, lies within the sound discretion of the trial court." *Ex parte Gov't Emp.'s Ins. Co. v. Goethe*, 373 S.C. 132, 135, 644 S.E.2d 699, 701 (2007).

> This Court will not disturb the lower court's decision on appeal unless a manifest abuse of discretion is found resulting in an error of law. Moreover, the error of law must be so opposed to the lower court's sound discretion as to amount to a deprivation of the legal rights of the party.

Id. (quoting *Jeter v. S.C. Dep't of Transp.*, 369 S.C. 433, 633 S.E.2d 143, 146 (2006)). Rule 24(a), SCRCP, provides:

> Upon timely application anyone shall be permitted to intervene in an action: (1) when a statute confers an unconditional right to intervene; or (2) when the applicant claims an interest relating to the property or transaction which is the subject of the action and he is so situated that the disposition of the action may as a practical matter impair or impede his ability to protect that interest, unless the applicant's interest is adequately represented by existing parties.

"Generally, the rules of intervention should be liberally construed where judicial economy will be promoted by declaring the rights of all affected parties." *Ex parte Gov't Emp.'s Ins. Co.*, 373 S.C. at 138, 644 S.E.2d at 702. Accordingly, this court "should consider the practical implications of a decision denying or allowing intervention." *Id.* "However, a party must have standing to intervene in an action pursuant to Rule 24, SCRCP." *Id.* "A party has standing if the party has a personal stake in the subject matter of a lawsuit and is a 'real party in interest.'" *Id.* (quoting *Bailey v. Bailey*, 312 S.C. 454, 458, 441 S.E.2d 325, 327 (1994)). "A real party in interest . . . is one who has a real, actual, material or substantial interest in the subject matter of the action, as distinguished from one who has only a nominal, formal, or technical interest in, or connection with, the action." *Id.* (quoting *Bailey*, 312 S.C. at 458, 441 S.E.2d at 327).

Pursuant to the family court's February 22, 2010 order granting intervention, Brother was allowed to enter the litigation on the following grounds: (1) Brother was joint owner of some of the marital property, (2) he was co-obligor on certain marital debts, (3) he had mortgaged some of his own property to obtain funds for Husband's businesses, and (4) he made loans to Husband to protect Husband's business interests. Wife notes Brother did not seek to enforce any debts he alleges were owed to him by Husband until he filed this motion to intervene approximately nine months after the marital litigation commenced.

Wife also argues Brother lacked standing because he was not a "real party in interest." As discussed above, a "real party in interest" is one with a "real, actual, material or substantial interest in the subject matter of the action." *See id.* In support of her claim, Wife cites to *Bailey*, in which our supreme court held that former attorneys for a party to domestic litigation lacked standing to intervene in the action with regard to an attorney's fees payment. 312 S.C. at 458, 441 S.E.2d at 327. The *Bailey* court explained that "the real interest lies with the parties in the divorce action—the appellants—and they alone have a real propriety interest in the subject matter of the proceedings. We find that [the attorneys'] interest as claimants asserting a right to attorney fees is peripheral and not the real interest at stake." *Id.*

Unlike the attorneys in *Bailey*, we find Brother satisfied the standing requirement of Rule 24, SCRCP. The record is replete with evidence that Brother had a property interest not only in the marital property, but also in other properties in which Wife argues she holds a marital interest. Brother was a co-obligor of much of the marital debt, which was confirmed by the court-appointed CPA, Tracy Amos. We also agree with the family court in that considering Husband's tenuous financial condition, Brother's interest in the various pieces of property—many of which are a substantial part of this litigation—could not be adequately protected unless Brother was allowed to intervene. Thus, we find the family court did not abuse its discretion in initially determining Brother had an interest in this litigation.

However, the record establishes that the family court erred in failing to control the depth of Brother's intervention. Throughout the trial, Brother's counsel was permitted to interject objections and comments regarding matters that had nothing to do with Brother's interests in the litigation.

For example, despite Brother's assertions that he had no ownership interest in Rice Market, Brother objected to questions regarding Rice Market's ownership, stating it "was acquired after the date of filing." Other examples reflecting Brother's unrelated involvement include (1) interrupting Husband when he tried to offer a stipulation; (2) "shushing" Husband when he made comments that might be adverse only to Husband's case; (3) successfully objecting to the introduction of the parenting coordinator's affidavit, despite Husband's statement that he was in agreement with it; (5) successfully making objections during the testimony of one of Wife's witnesses regarding Husband's false statements to various people about Wife's sexuality; and (6) cross-examining a former employee and babysitter of the couple regarding marital matters that had nothing to do with Brother or his financial interests. Of additional concern is that the family court requested that Brother's counsel draft the Final Order denying Wife's motion to alter or amend an interim order that dealt solely with the parties' grounds for divorce.

Overall, we find the family court improperly allowed Brother to influence the manner in which the assets and debts in the divorce case were distributed between Husband and Wife. Further, the family court's direction that counsel for Brother prepare the two orders following trial, which the family court subsequently approved as its Final Order, confirms the extent of Brother's influence on issues in this litigation that in no way involved Brother or his interests, such as custody, child support, alimony, and fault. *Cf. Ex parte Gov't Emp's Ins. Co.*, 373 S.C. 132, 138–39, 644 S.E.2d 699, 702 (2007) ("GEICO has no real interest in whether Cooper and Goethe have a valid common law marriage. GEICO's interest is in the financial implications of the family court's decision, which is peripheral to the subject matter before the court."); *id.* at 139, 644 S.E.2d at 703 ("[T]he subject matter of the family court action in the instant case is the validity of a common law marriage, which does not involve a determination of insurance benefits. Accordingly, GEICO does not have standing to intervene in the family court action because it does not have an interest sufficiently related to the subject matter of the action."); *Slatton v. Slatton*, 289 S.C. 128, 129–30, 345 S.E.2d 248, 249 (1986) (holding titleholder to automobile was entitled to opportunity to appear as a litigant in divorce proceeding and "to offer evidence to protect her property interest.").

Therefore, we hold that while the granting of the motion to intervene itself may have been within the discretion of the family court, the court's actions in repeatedly

permitting Brother to participate (and even control) certain decisions unrelated to the protection of Brother's property interests were erroneous.

II. Wife's Motion to Reopen the Case

After the two-week trial concluded, but before the family court issued a ruling, Wife moved to reopen the case. Wife's motion was based on several documents she received relating to the sale of a ten-percent share in BHBI to Greg and Constance Holmes as well as Brother's interest in BHEC. Wife argued these documents are relevant to (1) the alleged debts owed to Brother, (2) the credibility of Husband and Brother, and (3) other relevant matters, including a possible undisclosed operating and ownership arrangement regarding BHBI. The family court denied Wife's motion to reopen.

Wife claims that on July 13 and 14, 2011, Constance Holmes gave her a number of documents, including the following:

- A document dated December 21, 2009, from Husband to Greg and Constance Holmes regarding a $175,000 loan secured by up to ten percent of Breach Inlet (BHBI) shares;

- A December 22, 2009 memorandum, from J & S Fish, LLC to Greg Holmes from Keith Jones[12] referencing a $250,000 loan to Crew Carolina secured by ten percent of the net restaurant stock of BHBI;

- A November 23, 2009 promissory note, in the amount of $75,000 (borrower Rice Market, LCC) to be organized and collateralized by up to five percent interest in BHBI;

- A document titled "Private Placement Memorandum" on BHEC, stating Brother owns fifteen percent; and

[12] Keith Jones is the managing member of J & S Fish, LLC, which is the company that operates "The Amen Street Fish and Raw Bar."

- A December 23, 2009 promissory note, in the amount of $50,000 (borrower J & S Fish, LLC, d/b/a Amen Street Fish and Raw Bar) to Greg Holmes signed by Keith Jones.

To reopen a case based on newly discovered evidence, "a movant must establish that the newly discovered evidence: '(1) will probably change the result if a new trial is granted; (2) has been discovered since the trial; (3) could not have been discovered before the trial; (4) is material to the issue; and (5) is not merely cumulative or impeaching.'" *Lanier v. Lanier*, 364 S.C. 211, 217, 612 S.E.2d 456, 459 (Ct. App. 2005) (quoting James F. Flanagan, *South Carolina Civil Procedure* 484 (2d ed. 1996)).

These documents are clearly material to at least one property in which Wife claims she holds an equitable interest and Brother claims a debt. Despite this (and the fact that Husband denied the existence of certain of these documents), the family court offered the following unsupported analysis: (1) the documents would not have affected the outcome of the case, (2) they could have been discovered prior to trial, and (3) Wife sought to use the documents to impeach Husband and Brother.

As to the document dated December 21, 2009, Wife contended throughout the trial that the money from the Holmes—be it Greg and Constance Holmes or Holmes Capital—were loans. On the other hand, Husband and his accountant, Chip Robinson, contended Holmes Capital purchased a ten percent interest in BHBI. In sum, either Husband owns sixty versus seventy percent interest in BHBI, or he or his businesses owe repayment of the loan to the Holmes. The family court found the net effect of this was immaterial, relying upon its dubious finding that the marital estate had a negative net worth.

The family court's immateriality finding was erroneous, however, because the documents, properly considered, would have affected the outcome of the litigation. The categorization of the "sale" of assets versus "loans" from Brother (and others), as well as the manner in which Husband conducted the accounting relating to BHBI (the only income producing property found to be marital), were the key issues at trial with respect to the valuation of the marital estate and its apportionment.

For example, the Ellis Creek "Private Placement Memorandum" provides Brother was given a fifteen percent interest in BHEC, perhaps with no monetary investment in this particular venture. If this fifteen percent interest was in repayment of certain loans made by Brother, it should have offset at least some of the negative value the family court assigned the marital estate. Because the family court found the marital estate had a negative net worth based in large part upon Brother's marital debt allegations, business documents addressing Brother's ownership interests in marital assets or business ventures Husband may have financed (even in part) with marital funds certainly would have affected the outcome of the litigation in a properly conducted trial.

The Private Placement Memorandum and Rice Market documents are also material to Husband's control of BHBI, and his repeated use of this asset to fund subsequent business ventures. As noted previously, BHBI was the only remaining income-producing business that the family court found to be marital property. And it is not insignificant that Wife holds her own pre-apportionment five percent interest as well as a five percent interest as trustee on behalf of Child. The family court's ruling left Husband in control of not only the only marital income-producing asset, but also Wife and Child's non-marital percentage ownership interests. Thus, it is difficult to discern how such documents could *not* have affected the outcome of the litigation.

Nor can we agree that these documents could have been discovered prior to trial,[13] as the record is replete with evidence that Husband was evasive and uncooperative with discovery. This, along with the family court's repeated refusal to mandate that Husband comply with Rule 20, SCRFC's Financial Declaration requirement, mandates reversal.

III. Husband's Imputed Income

Wife argues the family court erred in imputing income of only $100,000 per year to Husband. Specifically, Wife claims the family court "completely disregarded

[13] It is difficult to determine how the family court reached its conclusion that Wife could have discovered the documents prior to trial because Husband testified that certain of these documents did not exist.

the overwhelming evidence presented at trial" that Husband's actual income is $892,958 per year. To the extent Husband argues Wife has not preserved the imputation issue for review, we disagree. We find the family court's analysis of Husband's income is incomplete and erroneous.

In *Marchant v. Marchant*, 390 S.C. 1, 7, 699 S.E.2d 708, 711 (Ct. App. 2010), the wife alluded to the fact that the husband was capable of earning more in the final hearing; however, she did not request a finding that the husband was voluntarily underemployed for the purpose of imputing income and the family court did not rule on the issue of income imputation. *Id.* This court subsequently determined that wife was required to file a Rule 59(e), SCRCP, motion to seek a ruling on that point, and she failed to do so. *Id.*

Here, however, Wife raised the issue of Husband's income several times to the family court, and she filed a Rule 59(e), SCRCP, motion seeking that the family court alter or amend its ruling on this issue. Additionally, the court-appointed CPA testified that she neither analyzed Husband's income nor his lifestyle. Despite Wife's repeated requests, Husband was not required to provide a current financial declaration at the start of trial or during the two separate trial weeks.[14] Throughout the two-week trial, Husband referred to a financial declaration that was over a year old, and Wife's counsel systematically dismantled it on cross-examination. Significantly, the family court failed to consider evidence presented regarding the various funds Husband received from his business entities, which he in turn used for personal expenses or to satisfy other obligations.

In *Grumbos v. Grumbos*, 393 S.C. 33, 43, 710 S.E.2d 76, 81 (Ct. App. 2011), the family court imputed additional income to Husband for purposes of calculating alimony, recognizing that "it was difficult to determine Husband's earning potential. Husband's testimony lacks credibility." In affirming, this court explained that "[w]ithout a meaningful representation of Husband's current income,

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[14] Husband filed only two financial declarations, one in June of 2009 and one in January of 2010, each reflecting his income to be $8,333 per month. These financial declarations include only the income Husband received from Crew Carolina. They in no way accurately reflect the disbursements paid directly to certain creditors on Husband's behalf or to Husband to cover certain personal expenses.

the family court was required to resort to other credible evidence, namely the parties' expenses, in assessing income." 393 S.C. at 43, 710 S.E.2d at 82. Here, Husband's business records reflected distributions of the following: (1) approximately $76,000 from Crew, identified only as "Cash Disbursements"; (2) another $266,000 from Crew, identified only as "Miscellaneous Expenses"; and (3) over $258,000 from BHBI, identified only as "Miscellaneous Expenses."

Husband's testimony that none of these expenses or disbursements were for his personal use is contradicted when examined in conjunction with his financial records. Specifically, the following were paid to or on Husband's behalf by Crew and BHBI: (1) approximately $14,000 for Husband's trips to France, New York, and Chicago; (2) approximately $4,400 in payments to Child's private school; (3) $42,000 in one year paid for his life insurance premiums; (4) thousands of dollars in payments on condo and farm mortgages; and (5) thousands of dollars paid to employees doing personal labor.

Husband claimed on multiple occasions throughout the trial that he was "broke" and survived on just $250 per week; however, as explained herein, the evidence shows Husband actually lived a comfortable lifestyle, despite his claims that he was likely being forced into bankruptcy. Based on the foregoing, we reverse and remand the income determination because the family court's imputation of only $100,000 in income per year to Husband was erroneous.

IV. Alimony

Wife argues the family court erred in failing to award her alimony, pointing to several factors she believes weigh heavily in favor of a substantial award of permanent alimony. Because we hold the family court improperly calculated Husband's imputed income, we reverse the denial of alimony and remand for the family court to conduct an appropriate alimony analysis.

"In domestic actions, this court reviews alimony awards and the family court's equitable apportionment of marital property for an abuse of discretion." *Reiss v. Reiss*, 392 S.C. 198, 207, 708 S.E.2d 799, 803–04 (Ct. App. 2011); *see also Dearybury v. Dearybury*, 351 S.C. 278, 282, 569 S.E.2d 367, 369 (2002) (finding the decision to grant or deny alimony rests within the sound discretion of the family court and will not be disturbed absent an abuse of discretion). "An abuse of

discretion occurs when the judge is controlled by some error of law or where the order, based upon findings of fact, is without evidentiary support." *Dearybury*, 351 S.C. at 282, 569 S.E.2d at 369.

"Alimony is a substitute for the support normally incident to the marital relationship and should put the supported spouse in the same position, or as near as is practicable to the same position, enjoyed during the marriage." *Reiss*, 392 S.C. at 208, 708 S.E.2d at 804. "If an award of alimony is warranted, the family court has a duty to make an award that is fit, equitable, and just." *Id.* South Carolina law provides that "[t]he family court may grant alimony in such amounts and for such term as the judge considers appropriate under the circumstances. *Id.*

In determining an award of alimony, the family court must consider the following factors:

> (1) duration of the marriage; (2) the physical and emotional health of the parties; (3) educational background of the parties; (4) employment history and earning potential of the parties; (5) standard of living during the marriage; (6) current and reasonably anticipated earnings of the parties; (7) current and reasonably anticipated expenses of the parties; (8) marital and nonmarital property of the parties; (9) custody of the children; (10) marital misconduct or fault; (11) tax consequences; (12) prior support obligations; and (13) any other factors the family court considers relevant.

S.C. Code Ann. § 20-3-130(C) (2014). "However, '[t]he family court is only required to consider relevant factors.'" *Reiss*, 392 S.C. at 209, 708 S.E.2d at 805 (alteration in original) (quoting *King v. King*, 384 S.C. 134, 142, 681 S.E.2d 609, 613 (Ct. App. 2009)). Further, "[a]limony is not intended to be a reward to one nor a punishment to the other. It is basically for the purpose of maintaining the status quo as near as possible [as] established by the parties." *Kane v. Kane*, 280 S.C. 479, 484, 313 S.E.2d 327, 330 (Ct. App. 1984).

Because the family court erred in calculating Husband's income and the marital debt—and reached no calculation as to the value of the marital estate, discussed *infra*—we reverse the denial of alimony to Wife and remand for the family court to consider Wife's entitlement to alimony in conjunction with an appropriate equitable apportionment analysis.
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V. Child Support Determination

Wife argues the family court erred in its determination of child support by (1) not properly calculating Husband's income when it set the child support and (2) not considering the needs of Child. Because we hold Husband's income was improperly calculated, the child support award must be reversed as well.

"The question of child support is largely within the discretion of the trial judge whose decision will not be disturbed on appeal unless an abuse of discretion is shown." *Hopkins v. Hopkins*, 343 S.C. 301, 305, 540 S.E.2d 454, 456 (2000). "An abuse of discretion occurs when the court is controlled by some error of law or where the order, based upon the findings of fact, is without evidentiary support." *Kelley v. Kelley*, 324 S.C. 481, 485, 477 S.E.2d 727, 729 (Ct. App. 1996). An appellate court will reverse a manifest abuse of discretion where the error of law is "so opposed to the trial judge's sound discretion as to amount to a deprivation of the legal rights of the party." *Jeter*, 369 S.C. at 438, 633 S.E.2d at 145. The term "abuse of discretion" does not reflect negatively on the trial court; rather, it merely indicates the appellate court believes an error of law occurred in the circumstances at hand. *See Macauley v. Query*, 193 S.C. 1, 5, 7 S.E.2d 519, 521 (1940).
In the Final Order, the family court ordered Husband to pay child support directly to Wife pursuant to the South Carolina Child Support Guidelines in the amount of $821 per month. The family court based this number upon an imputed income to Wife of $45,000 annually and to Husband of $100,000 annually. Additionally, the family court ordered Husband to provide health insurance for Child; however, Wife was ordered to pay the first $250 of uncovered medical, dental, and prescription expenses incurred per calendar year.

In support of her argument that the family court should have departed from the Child Support Guidelines and required Husband to provide additional benefits, Wife cites to *Rabon v. Rabon*, 288 S.C. 338, 342 S.E.2d 605 (1986). The court in *Rabon* held the trial court erred when it failed to consider the cost of private

schooling for the children when they could benefit from enrollment and father was able to afford to contribute. *Id.* at 340, 342 S.E.2d 606–07. In this case, Wife points out that Child grew up with the benefit of the following: (1) private schooling at Ashley Hall School, (2) attending summer camps, (3) a nice home, (4) vacation homes, (5) music lessons, (6) extensive travel, and (7) horseback riding/showing.

However, unlike the father in *Rabon*, it is not clear whether Husband can afford to pay for Child's private school education. While we agree with the family court that "both parties' standard of living must be substantially decreased as they have in the past lived off monies borrowed from various people or companies," we find this issue should also be remanded to the family court because Husband's income was not properly determined.

VI. Life Insurance to Secure Award of Alimony

Wife argues the family court erred in failing to require Husband to maintain life insurance or other security for alimony and child support. We remand this question for the court's consideration in conjunction with its alimony analysis and the recalculation of child support.

"The family court may order the payor spouse to obtain life insurance as security for an alimony or child support obligation if the supported spouse can demonstrate the existence of special circumstances with reference to her need for security and the payor spouse's ability to provide it." *Smith v. Smith*, 386 S.C. 251, 264, 687 S.E.2d 720, 727 (Ct. App. 2009). "In considering whether the supported spouse has demonstrated a need for such security, the family court shall consider 'the supported spouse's age, health, income, earning ability, and accumulated assets.'" *Id.* (quoting *Wooten v. Wooten*, 364 S.C. 532, 553, 615 S.E.2d 98, 109 (2005)). "If a need for security is found, the family court should then consider 'the payor spouse's ability to secure the award with life insurance by considering the payor spouse's age, health, income earning ability, accumulated assets, insurability, cost of premiums, and insurance plan carried by the parties during the marriage.'" *Id.* (quoting *Wooten*, 364 S.C. at 553, 615 S.E.2d at 109).

Wife argues "the circumstances justify requiring Husband to secure his alimony and child support payments with the same life insurance he had for the benefit of

Wife and daughter during the marriage." As to these circumstances, Wife pointed out that Husband, who was fifty-nine at the time of trial, is fifteen years older than Wife. Additionally, Child was twelve years old at the time of trial.

Our review of the record and the family court's orders does not demonstrate that the family court properly considered the need for the security or Husband's "income, earning ability, and accumulated assets" with respect to any of its findings. Thus, we reverse and remand the question of requiring Husband to maintain life insurance or other support security.

VII. Equitable Division of Marital Assets and Debts

Wife argues the family court erred in identifying, valuing, and apportioning various marital assets and debts. Specifically, Wife asserts the family court erred in the following: (1) its determination and apportionment of the marital interests in BHBI; (2) finding no "special equity" or transmutation in Kensington Plantation and the King Street properties; (3) its determination and apportionment of the "debts" owed to Brother; (4) ordering that Wife be responsible for certain debts owed to Brother; (5) failing to credit the marital estate with 50% of the $175,000 upfit monies; (6) reducing the value of 101 Palm Boulevard by $424,203; (7) failing to apportion valuable marital artwork between the parties; and (8) failing to include Wife's debts in the equitable division.

Although an appellate court has the authority to make findings of fact in accordance with its own view of the preponderance of the evidence, it nonetheless "should approach an equitable division award with a presumption that the family court acted within its broad discretion. The family court's award should be reversed only when the appellant demonstrates an abuse of discretion." *Lewis*, 392 S.C. at 384–85, 709 S.E.2d at 651 (quoting *Dawkins v. Dawkins*, 386 S.C. 169, 172–73, 687 S.E.2d 52, 54 (2010)).

The equitable apportionment statute, section 20-3-620(B) of the South Carolina Code (2014), enumerates the factors that must be considered by the family court in determining the appropriate division of marital assets. *See Smith v. Smith*, 327 S.C. 448, 460, 486 S.E.2d 516, 522 (Ct. App. 1997) (discussing the predecessor statute to section 20-3-620).

> These [factors] include, *inter alia*, the duration of the marriage, marital misconduct by either spouse, the health of each spouse, the income of each spouse, and the contribution of each spouse to the acquisition of the marital property, including the contribution of a spouse as homemaker.

Id.

As set forth above, the family court's conduct of the trial with regard to Brother's interest in the marital estate and Husband's debts owed to Brother was problematic and erroneous, leading to its finding that "[t]here is no equity in the marital assets." The root of this error, exacerbated by the conduct of the two-week trial itself, was the failure of the family court to "ensure that the debts were incurred for the joint benefit of the parties during the marriage." *See Allen v. Allen*, 287 S.C. 501, 507, 339 S.E.2d 872, 876 (Ct. App. 1986) (reversing portions of equitable distribution award which charged marital estate with loans from husband's sister and denied wife any interest in office building erroneously determined to have no equity to divide). In *Allen*, our court emphasized that "loans from close family members must be closely scrutinized for legitimacy." *Id*. No such scrutiny was applied in this matter.

We find the family court abused its discretion in ignoring the extent to which Kensington Plantation and the King Street properties have been interwoven with the debts owed Brother and the ongoing financing of the marital (and Husband's newer) business ventures. This, in addition to the errors noted above with regard to the family court's lack of concern with the unauthorized sale of ten percent of BHBI (and the undisclosed documents detailing such), the income from BHBI that the court failed to attribute to Husband, the failure of the court to consider Brother's undisclosed interest in BHEC, and the use of BHBI funds for such new ventures as Amen Street, J & S Fish, LLC, and Rice Market requires reversal of the entire equitable apportionment analysis as to both marital assets and marital debt.

VIII. Wife's Special Equity in New Businesses

Wife argues Husband has used marital funds from the couple's various businesses to fund the construction and operation of Amen Street Fish and Raw Bar, J & S

Fish, LLC, and the Rice Market restaurant despite the fact that Husband claims BHBI—his only income-producing asset—struggles to make payroll. For the aforementioned reasons, we reverse the family court's denial of a special equity to Wife. On remand, in consideration of this question, the family court must determine if the new businesses have been supported with funds either (1) earned by BHBI prior to the date of filing or (2) in which Wife and Child hold a percentage interest.

IX. Contempt

Wife argues the family court erred in failing to find Husband in contempt for failing to pay his portion of the fee for the court-appointed CPA as well as the fees Husband was ordered to pay Wife's attorney upon consideration of the sixth rule to show cause. We agree.

An appellate court "should reverse a decision regarding contempt 'only if it is without evidentiary support or the trial judge has abused his discretion.'" *Durlach v. Durlach*, 359 S.C. 64, 70, 596 S.E.2d 908, 912 (2004) (quoting *Stone v. Reddix-Smalls*, 295 S.C. 514, 516, 369 S.E.2d 840 (1988)); *see also Henderson v. Henderson*, 298 S.C. 190, 197, 379 S.E.2d 125, 129 (1989) ("A finding of contempt rests within the sound discretion of the trial judge."). "An abuse of discretion occurs either when the court is controlled by some error of law or where the order, based upon findings of fact, lacks evidentiary support." *Miller v. Miller*, 375 S.C. 443, 452, 652 S.E.2d 754, 759 (Ct. App. 2007) (quoting *Townsend v. Townsend*, 356 S.C. 70, 73, 587 S.E.2d 118, 119 (Ct. App. 2003)).

"Contempt results from the willful disobedience of an order of the court." *Bigham v. Bigham*, 264 S.C. 101, 104, 212 S.E.2d 594, 596 (1975); *Smith v. Smith*, 359 S.C. 393, 396, 597 S.E.2d 188, 189 (Ct. App. 2004); S.C. Code Ann. § 63-3-620 (Supp. 2015) ("An adult who wilfully violates, neglects, or refuses to obey or perform a lawful order of the court, or who violates any provision of this chapter, may be proceeded against for contempt of court."). "A willful act is one which is 'done voluntarily and intentionally with the specific intent to do something the law forbids, or with the specific intent to fail to do something the law requires to be done; that is to say, with bad purpose either to disobey or disregard the law.'" *Widman v. Widman*, 348 S.C. 97, 119, 557 S.E.2d 693, 705 (Ct. App. 2001) (quoting *Spartanburg Cty. Dep't of Soc. Servs. v. Padgett*, 296 S.C. 79, 82–83, 370

S.E.2d 872, 874 (1988)). "Where a contemnor is unable, without fault on his part, to obey an order of the court, he is not to be held in contempt." *Smith-Cooper v. Cooper*, 344 S.C. 289, 301, 543 S.E.2d 271, 277 (Ct. App. 2001).

Husband's contempt sentence from the sixth rule to show cause was suspended on the condition that he make the court-ordered payments to the court-appointed CPA and Wife's attorney. Because Husband failed to make the two payments, we hold the family court erred in failing to hold Husband in contempt or in any way address his nonpayment.

X. Grounds for Divorce

Wife next argues the family court erred in failing to grant her a divorce on the ground of adultery because the court's findings are not supported by the preponderance of the evidence. We reverse and remand.

In *Brown v. Brown*, 379 S.C. 271, 277–78, 665 S.E.2d 174, 178 (Ct. App. 2008), this court held proof of adultery must be made by a clear preponderance of the evidence and it may be proven by circumstantial evidence that shows a disposition to commit the offense as well as the opportunity to do so. "Generally, 'proof must be sufficiently definite to identify the time and place of the offense and the circumstances under which it was committed.'" *Id.* at 278, 665 S.E.2d at 178 (quoting *Loftis v. Loftis*, 284 S.C. 216, 218, 325 S.E.2d 73, 74 (Ct. App. 1985)). "Evidence placing a spouse and a third party together on several occasions, without more, does not warrant the conclusion the spouse committed adultery." *Id.*; *see also Mick-Skaggs v. Skaggs*, 411 S.C. 94, 102, 766 S.E.2d 870, 874 (Ct. App. 2014) (holding family court acted within its discretion in awarding parties a no-fault divorce based on one year's continuous separation, even though wife presented sufficient evidence to establish husband's adultery; evidence was presented that each spouse engaged in extramarital conduct during the marriage, and family court was in best position to assess the parties' and witnesses' testimony as well as the evidence presented in determining which ground for divorce was most appropriate under the circumstances).

Wife argues she clearly established Husband committed adultery with one employee paramour around the time the parties separated—the catalyst for the

separation—and with a second employee paramour shortly after the separation of the parties but prior to the date of filing—the catalyst for the divorce action.

We are concerned with the family court's handling of this trial, including its request for and acceptance of Brother's proposed order on the question of fault because Brother was purportedly permitted to intervene solely to protect his interests in the alleged marital debts and properties he owned with Husband. Thus, we reverse and remand for proper consideration of Wife's evidence on the question of marital fault.

XI. Attorney's Fees

Lastly, Wife argues the family court erred in not awarding her attorney's fees and costs. We agree.

Section 20-3-130(H) of the South Carolina Code (2014) authorizes the family court to order payment of litigation expenses to either party in a divorce action. "An award of attorney's fees rests within the sound discretion of the trial judge and should not be disturbed on appeal absent an abuse of discretion." *Garris v. McDuffie*, 288 S.C. 637, 644, 344 S.E.2d 186, 190 (Ct. App. 1986). However, if the substantive results obtained by counsel are reversed on appeal, the attorney's fee award must also be reversed. *Sexton v. Sexton*, 310 S.C. 501, 503–04, 427 S.E.2d 665, 666 (1993); *see also*, *E.D.M. v. T.A.M.*, 307 S.C. 471, 477, 415 S.E.2d 812, 816 (1992) (reversing the award of attorney's fees where the substantive results achieved by counsel were reversed on appeal).

"A family court should *first* consider the following factors as set forth in *E.D.M. v. T.A.M.*, in deciding *whether* to award attorney's fees and costs: (1) each party's ability to pay his or her own fee; (2) the beneficial results obtained by the attorney; (3) the parties' respective financial conditions; and (4) the effect of the fee on each party's standard of living." *Farmer v. Farmer*, 388 S.C. 50, 57, 694 S.E.2d 47, 51 (Ct. App. 2010) (citing *E.D.M.*, 307 S.C. at 476–77, 415 S.E.2d at 816). "A party's ability to pay is an essential factor in determining whether an attorney's fee should be awarded, as are the parties' respective financial conditions and the effect of the award on each party's standard of living." *Rogers v. Rogers*, 343 S.C. 329, 334, 540 S.E.2d 840, 842 (2001) (citing *Sexton*, 310 S.C. at 503, 427 S.E.2d at 666).

Here, the Final Order generally acknowledges the *E.D.M.* factors in deciding whether to award attorney's fees, but this finding is significantly impacted by the family court's erroneous rulings on Husband's income, alimony, and child support. A proper calculation of Husband's true income would establish his greater ability to pay fees. In addition, Husband's behavior in eliciting six rules to show cause, as well as his conduct throughout the trial, significantly increased the costs of this litigation. Thus, we reverse and remand with instructions for a proper analysis and award of Wife's attorney's fees and costs, including the ongoing suit costs she will likely incur on remand.

As to expert costs, the family court found both parties should equally bear the costs of the court-appointed CPA, Tracy Amos. We agree with Wife's argument that there is nothing in the Final Order regarding the reallocation of fees previously ordered to be paid to Amos. Therefore, we conclude this matter should also be remanded to the family court for a determination of the proper allocation of litigation expenses, including the impact of the rulings to be made on any open contempt issues.

CONCLUSION

For the foregoing reasons, the family court's orders of September 6, 2011, and October 15, 2011, are reversed and this matter is remanded for a new trial. Accordingly, the decision of the family court is

REVERSED AND REMANDED.

WILLIAMS and GEATHERS, JJ., concur.