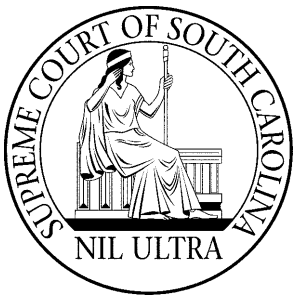

OPINIONS

OF

THE SUPREME COURT

AND

COURT OF APPEALS

OF

SOUTH CAROLINA

ADVANCE SHEET NO. 47
November 28, 2018
Daniel E. Shearouse, Clerk
Columbia, South Carolina
www.sccourts.org

CONTENTS

THE SUPREME COURT OF SOUTH CAROLINA

PUBLISHED OPINIONS AND ORDERS

UNPUBLISHED OPINIONS

None

PETITIONS - UNITED STATES SUPREME COURT

EXTENSION OF TIME TO FILE PETITION FOR WRIT OF CERTIORARI IN THE UNITED STATES SUPREME COURT

PETITIONS FOR REHEARING

None

The South Carolina Court of Appeals

PUBLISHED OPINIONS

UNPUBLISHED OPINIONS

PETITIONS FOR REHEARING

2018-UP-180-Callawassie Island Members Club v. Mark Quinn	Pending
2018-UP-255-Florida Citizens Bank v. Sustainable Building Solutions	Pending
2018-UP-327-State v. Joe Ross Worley	Pending
2018-UP-340-Madel Rivero v. Sheriff Steve Loftis	Pending
2018-UP-343-State v. Benjamin C. Hernandez	Pending
2018-UP-365-In re Estate of Norman Robert Knight, Jr.	Pending
2018-UP-368-Laurent Britton v. Charleston County	Pending
2018-UP-383-Statea v. Ardon P. Cato, II	Pending
2018-UP-385-Dennis Davis v. SCDPPPS	Pending
2018-UP-389-Gloria Terry v. Robert Terry, Sr.	Pending
2018-UP-391-State v. Corey A. Brown	Pending
2018-UP-412-Lahitsha Hampton v. George Willougby	Pending
2018-UP-414-James Thorpe v. Town of Bowman	Pending
2018-UP-417-State v. Dajlia S.Torbit	Pending

PETITIONS-SOUTH CAROLINA SUPREME COURT

5556-BLH by parents v. SCDSS	Pending
5559-Commissioners v. City of Fountain Inn	Pending
5561-Innovative Waster v. Crest Energy	Pending
5563-Angel Gary v. Lowcountry Medical	Pending
5564-J. Scott Kunst v. David Loree	Pending
5566-Tyrone York v. Longlands Plantation	Pending

5567-Karl Jobst v. Bryan Jobst (Brittany Martin)	Pending
5568-Amisub of South Carolina, Inc. v. SCDHEC	Pending
5571-William Crenshaw v. Erskine College	Pending
5572-State v. Steven Otts	Pending
5573-Skydive Myrtle Beach v. Horry County	Pending
5574-State v. Jeffrey D. Andrews	Pending
5579-State v. Nathaniel Wright	Pending
5581-Nathan Bluestein v. Town of Sullivan's Island	Pending
5583-Leisel Paradis v. Charleston County	Pending
5586-State v. Sha'quille Washington	Pending
5589-State v. Archie M. Hardin	Pending
5592-State v. Aaron S. Young, Jr.	Pending
5593-Lori Stoney v. Richard Stoney	Pending
2017-UP-338-Clarence Winfrey v. Archway Services, Inc. (3)	Pending
2018-UP-011-Charles Hobbs v. Fairway Oaks	Pending
2018-UP-078-David Wilson v. John Gandis	Pending
2018-UP-080-Kay Paschal v. Leon Lott	Pending
2018-UP-085-Danny B. Crane v. Raber's Discount Tire Rack	Pending
2018-UP-087-David Rose v. SCDOT	Pending
2018-UP-099-Shaul Levy v. Carolinian, LLC	Pending
2018-UP-111-State v. Mark Lorenzo Blake, Jr.	Pending
2018-UP-169-State v. Marquez Glenn	Pending

2018-UP-183-S.C. Community Bank v. Carolina Procurement	Pending
2018-UP-185-Peggy D. Conits v. Spiro E. Conits	Pending
2018-UP-187-State v. Rodney R. Green	Pending
2018-UP-191-Cokers Commons v. Park Investors	Pending
2018-UP-211-Hamilton Duncan v. Roy Drasites	Pending
2018-UP-214-State v. Tavarious Settles	Pending
2018-UP-216-Nicholas Geer v. SCDPPPS	Pending
2018-UP-221-Rebecca Delaney v. CasePro, Inc.	Pending
2018-UP-231-Cheryl DiMarco v. Brian A. DiMarco	Pending
2018-UP-237-Harold F. Jones v. State Farm Mutual	Pending
2018-UP-242-Linda Estrada v. Andrew Marshall	Pending
2018-UP-244-Albert Henson v. Julian Henson	Pending
2018-UP-250-Morningstar v. York County	Pending
2018-UP-260-Kenneth Shufelt v. Janet Shufelt	Pending
2018-UP-268-Holly Lawrence v. Jennifer Brown	Pending
2018-UP-269-Carleton Cantrell v. Aiken County	Pending
2018-UP-273-State v. Maurice A. Odom	Pending
2018-UP-275-Ronald Jarmuth v. The International Club	Pending
2018-UP-280-Scott Ledford v. Department of Public Safety	Pending
2018-UP-281-Philip Ethier v. Fairfield Memorial	Pending
2018-UP-287-S.C. Farm Bureau v. Michael Harrelson	Pending

2018-UP-317-Levi Thomas Brown v. State Farm	Pending
2018-UP-318-Theresa Catalano v. Jack Catalano	Pending
2018-UP-333-Roosevelt Simmons v. Mase and Company	Pending
2018-UP-335-State v. Samuel E. Alexander, Jr.	Pending
2018-UP-339-State v. James Crews	Pending
2018-UP-349-Verma Tedder v. Darlington County	Pending
2018-UP-352-Decidora Lazaro v. Burriss Electrical	Pending

THE STATE OF SOUTH CAROLINA
In The Supreme Court

The Senate of the State of South Carolina, by and through its President Pro Tempore, the Honorable Hugh K. Leatherman, Sr., Petitioner,

v.

His Excellency Henry D. McMaster, in his official capacity as Governor of the State of South Carolina, and Charles M. Condon, Respondents.

Appellate Case No. 2018-001455

IN THE ORIGINAL JURISDICTION

Opinion No. 27851
Heard November 8, 2018 – Filed November 28, 2018

DECLARATORY JUDGMENT ISSUED

John Carroll Moyla, III and Matthew Terry Richardson, both of Wyche P.A., of Columbia; Wade Stackhouse Kolb III, of Wyche P.A., of Greenville; and Andrew J.M. Bentz, pro hac vice, of Columbia, for Petitioner.

Chief Legal Counsel Richele Keel Taylor and Deputy Legal Counsel Thomas A. Limehouse, Jr., both of Office of the Governor, of Columbia and J. Robert Bolchoz, of Robert Bolchoz, LLC, of Columbia, for Respondents.

William C. Hubbard, B. Rush Smith, III, A. Mattison Bogan

and Carmen Harper Thomas, all of Nelson Mullins Riley & Scarborough, LLP, of Columbia, and Senior Vice President and General Counsel J. Michael Baxley, of Moncks Corner, for amicus curiae, South Carolina Public Service Authority.

PER CURIAM: Petitioner the Senate of the State of South Carolina, by and through its President Pro Tempore, the Honorable Hugh K. Leatherman Sr. (the Senate) initiated this action in the original jurisdiction of this Court pursuant to Rule 245, SCACR. The Senate asks this Court to declare invalid Respondent Governor Henry D. McMaster's (Governor McMaster or Governor) recess appointment[1] of Respondent Charles M. Condon (Condon) to the office of Chairman of the Board of Directors for the Public Service Authority (the Board), pursuant to section 1-3-210 of the South Carolina Code (2005).

In reaching the conclusions set forth in this opinion, we have not concerned ourselves with the reasons why a branch of government, whether it be the Legislative or the Executive, chooses to act or not act in any given circumstance. Such considerations are inherently political in nature and we have no designs upon intruding into those areas. Our role is to rule upon this controversy with requisite restraint, with a keen eye focused upon our one and only responsibility—to interpret section 1-3-210 in accordance with our rules of statutory construction. Both the Senate and Governor McMaster contend the plain language of this statute unambiguously supports their respective positions. We conclude the pertinent provisions of the statute are ambiguous. We hold Governor McMaster's appointment of Condon during the 2018 recess was valid.

I.

In this declaratory judgment action, the Senate challenges Governor McMaster's interim appointment of Condon to fill the vacancy created by former Chairman W. Leighton Lord III's December 29, 2017 resignation from the Board. The following facts are not in dispute. Former Chairman of the Board W. Leighton Lord III resigned from his position on December 29, 2017. At that time, the Senate

---

[1] S.C. Code Ann. § 1-3-210 refers to a recess appointment as an "interim appointment." We use these terms interchangeably.

was in recess. The Senate reconvened on January 9, 2018. During the eleven days from Lord's resignation to the date the Senate reconvened, Governor McMaster did not make a recess appointment.

On March 7, 2018, pursuant to section 58-31-20(A) of the South Carolina Code (2015), Governor McMaster formally nominated Condon to serve as chairman of the Board for the remainder of Lord's unexpired term and for a succeeding full term. On March 13, 2018, the Senate referred Condon's nomination to the Senate Judiciary Committee for consideration. Thereafter, as required by section 58-3-530(14) of the South Carolina Code (2015), the State Regulation of Public Utilities Review Committee (PURC) screened Condon and determined he met the qualifications of section 58-31-20(C) of the South Carolina Code (2015). On May 4, 2018, PURC reported Condon's qualification to the Clerk of the Senate. On May 8, 2018, the Senate Judiciary Committee held Condon's confirmation hearing, but the Senate adjourned on June 28, 2018, without taking final action on Condon's nomination.

On July 23, 2018, Governor McMaster sent a letter to the Senate advising of his interim appointment of Condon to fill the vacancy created by Lord's resignation. Citing section 1-3-210, Governor McMaster stated he would, during the next regular Senate session, forward a formal appointment of Condon for the Senate's consideration. The Senate objected to Governor McMaster's authority to make this appointment. The Senate and Governor McMaster disagree upon the interpretation of section 1-3-210. Pursuant to Rule 245, SCACR, we granted the Senate's petition for original jurisdiction to review Governor McMaster's interim appointment.

II.

We first address whether President Pro Tempore Leatherman was authorized to bring this action. Pursuant to section 58-31-20(A), the Governor's power to appoint directors of the Public Service Authority is subject to "the advice and consent of the Senate." There can be no doubt, therefore, the Senate has the power to bring suit to litigate what it perceives to be an infringement of its authority under that section. In particular, the Senate may bring an action seeking a declaration whether the Governor exceeded his power by making a recess appointment under the circumstances we explained above. However, the manner in which that Senate power may be exercised—how any governmental power may be exercised—must be determined by law.

The Governor's reappointment of Condon occurred after the Senate adjourned. Thus, the Senate itself never had a chance to vote on whether to authorize President Pro Tempore Leatherman to bring this action. In a written response to the Court's inquiry of what provision of law gives the President Pro Tempore the authority to bring an action on behalf of the Senate without specific Senate authorization, counsel stated the President Pro Tempore "is authorized by virtue of his election to that office and through the tradition and practice of the Senate." We know of no provision of law under which "the tradition and practice" of the Senate could support the President Pro Tempore's authority to bring this action. We are concerned, therefore, that the President Pro Tempore is not authorized to bring this action.

We acknowledge the Court—not the parties—raised this issue, and the Governor does not question the authority of the President Pro Tempore to bring this action. We also acknowledge that similar actions have been brought in the past, and we did not question the authority of the President Pro Tempore to do so. *See, e.g.*, *Drummond v. Beasley*, 331 S.C. 559, 503 S.E.2d 455 (1998); *Williams v. Morris*, 320 S.C. 196, 464 S.E.2d 97 (1995). To our knowledge, the issue has never been raised to this Court. However, the limitations on the power of an individual senator to bring an action in furtherance of Senate business are well-established under federal law. In *Reed v. County Commissioners of Delaware County, Pennsylvania*, 277 U.S. 376 (1928), the Supreme Court of the United States held that Senators of a special committee created by the United States Senate could not sue without express authorization from the Senate to do so. 277 U.S. at 389; *see also* Alissa M. Dolan & Todd Garvey, Cong. Research Serv., R42454, *Congressional Participation in Article III Courts: Standing to Sue* 11 (2014) (stating "an institutional plaintiff has only been successful in establishing" the authority to bring suit "when it has been authorized to seek judicial recourse on behalf of a house of Congress"). Lower federal courts have relied on *Reed* and the proposition for which it stands to dismiss lawsuits brought by individual members of Congress, and even lawsuits brought by committees of the House or Senate, without express authorization by the House or Senate. *See, e.g.*, *In re Beef Indus. Antitrust Litig.*, 589 F.2d 786, 791 (5th Cir. 1979) (requiring dismissal of appeal without any decision on the merits where the House subcommittee chairmen "failed to obtain a House resolution or any other similar authority before they sought to intervene in the . . . case"); *see also United States v. Am. Tel. & Tel. Co.*, 551 F.2d 384, 391 (D.C. Cir. 1976) (finding the House resolution sufficiently authorized the chairman of a subcommittee to represent the House in the lawsuit); *Senate Select Comm. on Presidential Campaign Activities v.*

Nixon, 498 F.2d 725, 727 (D.C. Cir. 1974) (noting the Senate Select Committee had authorization to sue and enforce subpoenas against the President pursuant to a Senate resolution expressly authorizing the committee to do so); *Comm. on Oversight & Gov't Reform v. Holder*, 979 F. Supp. 2d 1, 21 (D.D.C. 2013) (finding House committee could initiate an action to enforce subpoena where "the House of Representatives . . . specifically authorized the initiation of [the] action to enforce the subpoena"); *Comm. on Judiciary, U.S. House of Representatives v. Miers*, 558 F. Supp. 2d 53, 71 (D.D.C. 2008) (concluding the House Committee on the Judiciary could bring civil action where the Committee "ha[d] been expressly authorized by House Resolution to proceed on behalf of the House of Representatives as an institution") (emphasis removed from original).

Despite these concerns, we will address the merits of the Senate's challenge to the Governor's recess appointment of Condon. In future actions, however, the Court must examine the President Pro Tempore's threshold authority to bring the action. In any given case, such authority could derive from a majority vote of the members of the Senate as to the individual case, or it could derive from a rule or statute granting the President Pro Tempore such authority without the need for specific authorization by vote.

III.

Section 58-31-20(A) provides, "In the event of a director vacancy due to death, resignation, or otherwise, the Governor must appoint the director's successor, with the advice and consent of the Senate, and the successor-director shall hold office for the unexpired term." Here, Lord resigned during the 2017 recess of the Senate; there is no dispute that section 58-31-20(A) gives Governor McMaster the authority to appoint Lord's successor and gives the Senate the authority to advise and consent in this endeavor. The first question before the Court is whether Governor McMaster had the authority to appoint Condon during the 2018 recess.

The Governor's authority to make a recess appointment is set forth in section 1-3-210:

> During the recess of the Senate, vacancy which occurs in an office filled by an appointment of the Governor with the advice and consent of the Senate may be filled by an interim appointment of the Governor. The Governor must report the interim appointment to the Senate and must

> forward a formal appointment at its next ensuing regular session.
>
> If the Senate does not advise and consent thereto prior to sine die adjournment of the next ensuing regular session, the office shall be vacant and the interim appointment shall not serve in hold over status notwithstanding any other provision of law to the contrary. A subsequent interim appointment of a different person to a vacancy created by a failure of the Senate to grant confirmation to the original interim appointment shall expire on the second Tuesday in January following the date of such subsequent interim appointment and the office shall be vacant.

With due focus on the first sentence of the first paragraph of section 1-3-210, the Senate argues the plain language of section 1-3-210 unambiguously authorizes the Governor to make a recess appointment only during the recess in which the vacancy initially arose. Again, in this case, that time frame fell between the date of Lord's resignation, December 29, 2017, and the date the Senate reconvened, January 9, 2018. The Governor did not make a recess appointment during the eleven days remaining in the recess. The Senate claims the 2018 recess appointment was invalid because Governor McMaster's statutory authority to make a recess appointment could be exercised only during the recess in which the vacancy initially arose. The Senate also claims Governor McMaster's recess appointment of Condon is in violation of the separation of powers doctrine.[2]

Governor McMaster claims section 1-3-210 unambiguously allows him to make a recess appointment during any recess in which the vacancy exists. Governor McMaster also contends the doctrine of separation of powers is not offended by his interpretation of the statute.

---

[2] In its brief to this Court, the Senate alternatively argued that even if Governor McMaster had the threshold authority to appoint Condon during a recess in which the vacancy did not arise, section 1-3-210 prohibited Governor McMaster from appointing Condon because the Senate did not confirm Condon during the 2018 session. At oral argument, the Senate appropriately conceded otherwise; consequently, the Senate's sole argument is that Governor McMaster did not have the authority to appoint Condon during the 2018 recess.

"The cardinal rule of statutory construction is to ascertain and effectuate the intent of the legislature." *Hodges v. Rainey*, 341 S.C. 79, 85, 533 S.E.2d 578, 581 (2000). "Under the plain meaning rule, it is not the court's place to change the meaning of a clear and unambiguous statute." *Id*. "Where the statute's language is plain and unambiguous, and conveys a clear and definite meaning, the rules of statutory interpretation are not needed and the court has no right to impose another meaning." *Id*.

However, a statute "must be read as a whole and sections which are part of the same general statutory law must be construed together and each one given effect." *CFRE, L.L.C. v. Greenville Cty. Assessor*, 395 S.C. 67, 74, 716 S.E.2d 877, 881 (2011) (quoting *S.C. State Ports Auth. v. Jasper Cty.*, 368 S.C. 388, 398, 629 S.E.2d 624, 629 (2006)). As such, "we read the statute as a whole and in a manner consonant and in harmony with its purpose." *Id*. "We therefore should not concentrate on isolated phrases within the statute." *Id*. In addition, "we must read the statute so 'that no word, clause, sentence, provision or part shall be rendered surplusage, or superfluous,' for '[t]he General Assembly obviously intended [the statute] to have some efficacy, or the legislature would not have enacted it into law.'" *Id*. (quoting *State v. Sweat*, 379 S.C. 367, 382, 665 S.E.2d 645, 654 (Ct. App. 2008), *aff'd*, 386 S.C. 339, 688 S.E.2d 569 (2010)).

A.

In order to determine whether section 1-3-210 unambiguously authorizes the Governor to make a recess appointment only during the recess in which the vacancy arose, we must explore the meaning of the first sentence of the first paragraph of section 1-3-210, which reads as follows: "During the recess of the Senate, vacancy which occurs in an office filled by an appointment of the Governor with the advice and consent of the Senate may be filled by an interim appointment of the Governor." Does the phrase "During the recess of the Senate" relate to when the vacancy occurs or to when the vacancy may be filled? The Senate contends the phrase unambiguously relates to both, thus temporally restricting the Governor's initial authority to make a recess appointment to the recess in which the vacancy first arose. Governor McMaster contends the phrase unambiguously relates not to when the vacancy first arose, but to when the Governor may make a recess appointment, i.e., during any recess of the Senate.

The Senate and the Governor are also at odds as to the meaning to be given to the word "occurs" as it is used in the statute. The Senate claims the word "occurs" is used in its basic literal sense and can only mean "the sudden happening of an event." Thus, the Senate argues, the Governor has the authority to make recess appointments only during the recess in which the vacancy first arose, and if the Governor fails to do so, the power to make a recess appointment for that vacancy is forfeited. Governor McMaster contends a vacancy may "occur" during the recess of the Senate even though it may have come into being before that recess; the Governor contends the weight of authority equates the term "occurs" with the term "exists," thus reducing or removing the temporal limitations of the Governor's recess-appointment authority.

The Recess Appointments Clause found in the United States Constitution contains language similar to section 1-3-210. It provides, "The President shall have Power to fill up all Vacancies that may happen during the Recess of the Senate, by granting Commissions which shall expire at the End of their next Session." U.S. Const., art. II, § 2, cl. 3. The meaning of this clause has been disputed in the federal courts. Because section 1-3-210 is similar[3] to, and was enacted in the same spirit and for the same purpose as, the Recess Appointments Clause, we will survey federal jurisprudence on the issue. *See Unisun Ins. v. Hawkins*, 342 S.C. 537, 542, 537 S.E.2d 559, 561-62 (Ct. App. 2000) (noting that where a state rule has adopted the language of a federal rule, federal cases interpreting the federal rule are persuasive).

In *National Labor Relations Board v. Noel Canning*, 134 S. Ct. 2550 (2014), the United States Supreme Court considered the question of whether the President's appointment of three members to the National Labor Relations Board (N.L.R.B.) during a three-day Senate adjournment violated the Recess Appointments Clause. 134 S. Ct. at 2552. The dispute arose when the N.L.R.B. found Noel Canning, a

[3] The Recess Appointments Clause contains the term "happen," whereas section 1-3-210 contains the term "occurs." We have previously used these terms synonymously. *See Gibbes v. Richardson*, 107 S.C. 191, 194-97, 92 S.E. 333, 334-35 (1917); *see also Ins. Co. of N. Am. v. Constr. Co.*, 583 P.2d 1335, 1337 (Cal. 1978) (noting that an occurrence is synonymous with something that happens); *Richardson v. Young*, 125 S.W. 664, 683 (Tenn. 1910) ("The words 'occur' and 'happen' are usually used in referring to vacancies in office, and mean the same thing."); Webster's Third International Dictionary 1561 (3d ed. 2002) (providing that "occur" is a synonym for "happen").

Pepsi-Cola distributor, had unlawfully refused to reduce to writing and execute a collective-bargaining agreement with a labor union. *Id*. at 2557. Noel Canning subsequently asked the United States Court of Appeals for the District of Columbia Circuit to set the Board's order aside, arguing that three of the five Board members had been invalidly appointed, leaving the Board without the three lawfully appointed members necessary for it to act. *Id*.

The President had appointed the three N.L.R.B. board members during a three-day recess provided for in a Senate resolution governing pro forma sessions that were taking place until the Senate resumed ordinary business. *Id*. One of the appointments had been pending in the Senate for approximately one year, while the other two had been pending several weeks at the time the President invoked the Recess Appointments Clause and appointed all three to the N.L.R.B. *Id*. Noel Canning argued the Recess Appointments Clause did not authorize the appointments because the Recess Appointments Clause did not contemplate nominations during such a short recess. *Id*.

The D.C. Circuit Court of Appeals concluded the appointments were impermissible under the Recess Appointments Clause, holding the phrase "the recess of the Senate" did not include recesses within a formal session of Congress. *Id*. at 2557-58. The Court of Appeals further found that the phrase "vacancies that may happen during the recess" applies only to vacancies that come into existence during a particular recess. *Id*. at 2558.

The Supreme Court affirmed the Court of Appeals in result, holding the Recess Appointments Clause does not apply to a Senate recess of such short duration. *Id*. at 2567. However, the Supreme Court found the meaning of the phrase "the recess" to be ambiguous and rejected the Court of Appeals' overall interpretation of the Recess Appointments Clause; the Supreme Court articulated the following:

> [T]he word "the" in "*the* recess" might suggest that the phrase refers to the single break separating formal sessions of Congress. That is because the word "the" frequently (but not always) indicates "a particular thing." But the word can also refer "to a term used generically or universally." The Constitution, for example, directs the Senate to choose a President *pro tempore* "in *the* Absence of the Vice–President." And the Federalist Papers refer to

> the chief magistrate of an ancient Achaean league who "administered the government in *the* recess of the Senate." Reading "the" generically in this way, there is no linguistic problem applying the Clause's phrase to both kinds of recess. And, in fact, the phrase "the recess" was used to refer to intra-session recesses at the time of the founding.

Id. at 2561 (internal citations omitted). More importantly, the Court further found the intent of the Recess Appointments Clause required a broad interpretation in order to effectuate its purpose. *Id*. Because the Clause was intended to facilitate the continued functioning of the federal government during a Senate recess, the Court found the President has the power to make such appointments during either inter- or intra-session recesses, and the "capacity of the Senate to participate in the appointments process has nothing to do with the words it uses to signal its departure." *Id*.

The Supreme Court also rejected the Court of Appeals' finding that the clause "Vacancies that may happen during the Recess of the Senate" includes only vacancies that arise during a recess. *Id*. at 2567. The Court found the term "that may happen" can be read to include not only the initial occurrence of an event, but the existence of an event that may happen to fall during a given period of time. *Id*. The Court, in finding the clause was ambiguous, examined the history of the usage of the term "happen" with respect to vacancies:

> Thomas Jefferson wrote that the Clause is "certainly susceptible of [two] constructions." It "may mean 'vacancies that may happen to be' or 'may happen to fall'" during a recess. Jefferson used the phrase in the first sense when he wrote to a job seeker that a particular position was unavailable, but that he (Jefferson) was "happy that *another vacancy happens* wherein I can . . . avail the public of your integrity & talents," for "the office of Treasurer of the US. *is vacant* by the resignation of mr Meredith." *See also* Laws Passed by the Legislature of Florida, No. 31, An Act to Organize and Regulate the Militia of the Territory of Florida § 13, H.R. Exec. Doc. No. 72, 27th Cong., 3d Sess., 22 (1842) ("[W]hen any vacancy shall take place in the office of any lieutenant

> colonel, it shall be the duty of the colonel of the regiment in which such vacancy may happen to order an election to be held at the several precincts in the battalion in which such vacancy *may happen*.") (emphasis added).
>
> Similarly, when Attorney General William Wirt advised President Monroe to follow the broader interpretation, he wrote that the "expression seems not perfectly clear. It may mean 'happen to take place:' that is, '*to originate*,'" or it "may mean, also, without violence to the sense, 'happen to exist.'" The broader interpretation, he added, is "most accordant with" the Constitution's "reason and spirit."
>
> We can still understand this earlier use of "happen" if we think of it used together with another word that, like "vacancy," can refer to a continuing state, say, a financial crisis. A statute that gives the President authority to act in respect to "any financial crisis that may happen during his term" can easily be interpreted to include crises that arise before, and continue during, that term.

Id. at 2567-68 (internal citations omitted).

The Supreme Court concluded that the clause "Vacancies that may happen during the Recess of the Senate" was ambiguous and a broad reading permitting the President to fill vacancies existing during a legislative recess was more reasonable given the purpose of the Recess Appointments Clause in ensuring the continued functioning of the federal government. *Id*. at 2568-73.

Other federal courts have offered equally persuasive commentary on this controversy. The United States Court of Appeals for the Eleventh Circuit opined:

> About the phrase in the Recess Appointments Clause that speaks of filling "Vacancies that may happen during the Recess," we accept this phrase, in context, means that, if vacancies "happen" to exist during a recess, they may be filled on a temporary basis by the President. This view is consistent with the understanding of most judges that have

> considered the question, written executive interpretations from as early as 1823, and legislative acquiescence.
>
> On its face, the phrase is open to more than one interpretation. For example, the word "happen" can be defined as "befall" which has been defined as "happen to be." Therefore, the phrase's most accepted interpretation (upon which the President has relied and that we too accept) does not contradict the plain meaning rule.
>
> In addition, as we understand the history, early Presidents—when delegates to the Constitutional Convention were still active in government—made recess appointments to fill vacancies that originated while the Senate was in Session. For example, President Washington, during a Senate break in 1789, appointed Cyrus Griffin to fill a judgeship created during a previous Session; and President Jefferson, during a Senate break in 1801, appointed three judges to fill vacancies created during a previous Session.
>
> Congress at least implicitly agrees with this view of recess appointments. Furthermore, interpreting the phrase to prohibit the President from filling a vacancy that comes into being on the last day of a Session but to empower the President to fill a vacancy that arises immediately thereafter (on the first day of a recess) contradicts what we understand to be the purpose of the Recess Appointments Clause: to keep important offices filled and the government functioning.

Evans v. Stephens, 387 F.3d 1220, 1226-27 (11th Cir. 2004) (internal citations omitted).

In addition, the United States Court of Appeals for the Ninth Circuit explained the problematic policy implications in a narrow reading of the Recess Appointments Clause:

> [Such an] interpretation would lead to the absurd result that all offices vacant on the day the Senate recesses would have to remain vacant at least until the Senate reconvenes. Not only judicial positions, but all offices within the purview of article II, § 2, clause 2 would have to remain vacant. The positions of cabinet members and other high government officials would have to remain unfilled until the return of the Senate. If a vacancy occurred on the last day before the Senate's recess, the President would be without power to fill that vacancy in the ensuing recess. Even assuming that the Senate was informed of the vacancy prior to its recess and the President submitted a timely nomination, the Senate would still be faced with the dilemma of either confirming a candidate of whose qualifications little is known or leaving that office vacant until the Senate reconvenes. We agree with the Second Circuit that this interpretation "would create Executive paralysis and do violence to the orderly functioning of our complex government."

United States v. Woodley, 751 F.2d 1008, 1012-13 (9th Cir. 1985).[4]

States have likewise noted the difficulty in ascertaining the precise understanding of when an event "occurs" or "happens" within the context of recess appointments. In *Fritts v. Kuhl*, the New Jersey Supreme Court held the governor

[4] Other authorities offer similar pronouncements. *See, e.g.*, *United States v. Allocco*, 305 F.2d 704, 712-15 (2d Cir. 1962) (finding the President may make appointments to all vacancies that exist during a Senate recess); *In re Farrow*, 3 F. 112, 116 (N.D. Ga. 1880) (finding the President has power to make appointments "notwithstanding the fact that the vacancy filled by his appointment first happened when the senate was in session"); *see also Exec. Auth. to Fill Vacancies*, 1 Op. Att'y Gen. 631, 633 (1823) ("[W]hether [a vacancy] arose during the session of the Senate, or during their recess, it equally requires to be filled."); *Power of President to Fill Vacancies*, 2 Op. Att'y Gen. 525, 528 (1832) (opining that the President may make recess appointments "if there happen to be any vacancies during the recess"); *Vacancy in Office*, 19 Op. Att'y Gen. 261, 263 (1889) ("[W]herever there is a vacancy there is a power to fill it.") (emphasis removed from original).

of New Jersey properly filled a judgeship, the vacancy of which arose while the state legislature was in session, despite the fact that the legislature failed to confirm the appointee. 17 A. 102, 107-08 (N.J. Sup. Ct. 1889). The New Jersey Constitution provided that "when a vacancy happens during the recess of the legislature in any office which is to be filled by the governor and senate, or by the legislature in joint meeting, the governor shall fill such vacancy, and the commission shall expire at the end of the next session of the legislature, unless a successor shall be sooner appointed." *Id*. at 102. The court considered the question of whether a vacancy that arose during a legislative session was considered a vacancy during the subsequent recess where the governor appointed an individual during the legislative session that the legislature declined to confirm. *Id*. at 102. The court articulated the difficulty in adopting a simplistic reading of the term "happens," stating:

> The word "happen," in its strictest literal sense, signifies an unexpected event. It is also not uncommonly used as synonymous with "occur," "take place," "exist," and "happens to be." In its most rigorous meaning, if the contingency implied by it is referred strictly to the time of the occurrence of the vacancy, it will exclude the power of the governor to appoint where an official term expires by its own limitation in the recess, for in that there is nothing uncertain; the time is fixed and definite. On the contrary, it may be said that while there is no uncertainty as to the point of time when the vacancy will occur in such a case, there is uncertainty whether the senate will be in session, and therefore a word implying an unexpected event is properly used. It may also be argued that if the uncertainty implied by the word "happens" is as to the senate being in session, the vacancy does not happen then,—the time of that is certain, but the senate happens not to be in session, and that the constitutional clause should be read as follows: "When it happens that the senate is not in session when there is a vacancy." This would give the governor power to appoint in all cases of vacancy. These suggestions are made to show that the import of this clause is not free from doubt.

Id. at 102-03.

Finally, in *Gibbes*, this Court tangentially addressed the issue of whether a vacancy "occurred" during a recess of the General Assembly when the vacancy initially arose while the General Assembly was still in a preceding session. 107 S.C. at 196-97, 92 S.E. at 334-35. Section 694 of the Civil Code of 1912 provided that "any vacancies which may happen in any of the said offices during the recess of the Senate may be filled by the Governor," and named the offices which could be so filled. *Id*. at 194, 92 S.E. at 333. Though the vacancy at issue initially arose during a previous regular session of the General Assembly, the governor made the recess appointment following the General Assembly's adjournment. *See id*. at 196-97, 92 S.E. at 333. While our observation on this point was arguably dictum, we noted "[t]he vacancy 'occur[red]' during the recess, even though it was initialed before the recess." *Id*. at 197, 92 S.E. at 335.

The reasoning advanced in *Noel Canning*, *Evans*, and *Woodley*, among others, is sound. We find the language of section 1-3-210, specifically the phrases, "During the recess of the Senate," and "vacancy which occurs," is ambiguous. Therefore, in interpreting the statute, we must ascertain and effectuate the intent of the legislature. *Hodges*, 341 S.C. at 85, 533 S.E.2d at 581.

We find the General Assembly intended to ensure a more efficient transfer of authority among the myriad of important administrative positions, the functioning of which are necessary to effectively run a complex government. We find that in order to fulfill this purpose, the General Assembly intended the first paragraph of section 1-3-210 to apply to vacancies that exist during a recess. *See Noel Canning*, 134 S. Ct. at 2567-69; *Evans*, 387 F.3d at 1226-27; *Gibbes*, 107 S.C. at 197, 92 S.E. at 335; *Fritts*, 17 A. at 107-08; *see also State v. Young*, 68 So. 241, 247 (La. 1915) (stating that where the state constitution provided "[t]he Governor shall have the power to fill vacancies that may happen during the recess of the Senate," a vacancy which arose during a regular legislative session was properly filled by the governor during the ensuing recess). Webster's Dictionary provides, as the first definition of "occur," the following: "to be present or met with: EXIST." Webster's Third International Dictionary 1561 (3d ed. 2002).

We further find section 1-3-210 references the recess of the Senate in a universal sense, meaning any recess of the Senate. *See Noel Canning*, 134 S. Ct. at 2561; *Allocco*, 305 F.2d at 712-15; *In re Farrow*, 3 F. at 115-16. Therefore, we hold section 1-3-210 gives the Governor the power to make a recess appointment to any vacancy that exists during a recess of the Senate, regardless of when the vacancy initially arose. *See State ex rel. Saint v. Irion*, 125 So. 567, 570 (La. 1929) (noting

that "even in a doubtful case, a statute providing for the filling of a vacancy must be construed so as to avoid" leaving an office vacant).

One obvious limitation upon this exercise of power by the Governor is found in the second paragraph of section 1-3-210. This limitation, not applicable to the instant case, provides that if the Governor makes a recess appointment and the recess appointee is not confirmed by the Senate during the ensuing regular session, the Governor may make another recess appointment during the next Senate recess, but the next appointee must be a different person. That recess appointment of a different person expires on the second Tuesday in January following the date of such recess appointment, at which time the office is considered vacant.

Next, we turn to the Senate's argument that our interpretation of section 1-3-210 renders as surplusage the language in the second paragraph granting the Governor the power to fill the vacancy created by the Senate's failure to confirm the interim appointee. The Senate maintains that if the first paragraph of the statute means the Governor may fill any vacancy that exists during a recess of the Senate, regardless of when the vacancy arose, there would be no need to grant the Governor the power to fill the vacancy created by the Senate's failure to confirm the prior recess appointment. We disagree with the Senate. As we have discussed, the second paragraph can be plainly read to limit the Governor's recess appointment power with respect to an immediately previous recess appointee, and our reading of the first paragraph of the statute in no way impacts this restriction. The meaning of the second paragraph is clear, and the factual scenario contemplated therein is not in play in this case: if the Governor makes a recess appointment and the Senate does not confirm the appointment during the ensuing regular session, the Governor may not recess-appoint the same person during the next recess.

B.

The Senate argues our interpretation of section 1-3-210 will incentivize the executive branch to engage in a dangerous expansion of executive power. The Senate contends our interpretation of the statute would encourage the following scenario: The Governor can refuse to appoint someone to a vacancy once it arises during a Senate session, wait until the Senate adjourns, and make a recess appointment. Then, if the Senate rejects the recess appointment upon presentment in the ensuing legislative session, the Governor can refuse to submit another appointment, and, after the Senate adjourns, the Governor can make another recess appointment to the same vacancy. The Senate suggests this process could continue

ad infinitum to the complete subversion of the government, and would constitute a degradation of the checks on executive power ordained by the South Carolina Constitution. *See* S.C. Const. art. I, § 8 ("In the government of this State, the legislative, executive, and judicial powers of the government shall be forever separate and distinct from each other, and no person or persons exercising the functions of one of said departments shall assume or discharge the duties of any other."); *see also Heyward v. Long*, 178 S.C. 351, 377, 183 S.E. 145, 156 (1935) ("The principle is universally recognized that the Governor of a state has no inherent power of appointment to office, and that his power must be found *in the Constitution or statutes of the state*.").

We note concerns of this sort have been commonplace since the foundation of the Republic. The Supreme Court grappled with the problem of hypothetical government dysfunction in *Noel Canning*, stating:

> The Clause's purpose strongly supports the broader interpretation. That purpose is to permit the President to obtain the assistance of subordinate officers when the Senate, due to its recess, cannot confirm them. Attorney General Wirt clearly described how the narrower interpretation would undermine this purpose:
>
> > "Put the case of a vacancy occurring in an office, held in a distant part of the country, on the last day of the Senate's session. Before the vacancy is made known to the President, the Senate rises. The office may be an important one; the vacancy may paralyze a whole line of action in some essential branch of our internal police; the public interests may imperiously demand that it shall be immediately filled. But the vacancy happened to occur during the session of the Senate; and if the President's power is to be limited to such vacancies only as happen to occur during the recess of the Senate, the vacancy in the case put must continue, however ruinous the consequences may be to the public."

> Examples are not difficult to imagine: An ambassadorial post falls vacant too soon before the recess begins for the President to appoint a replacement; the Senate rejects a President's nominee just before a recess, too late to select another. Wirt explained that the "substantial purpose of the constitution was to keep these offices filled," and "if the President shall not have the power to fill a vacancy thus circumstanced, . . . the substance of the constitution will be sacrificed to a dubious construction of its letter." Thus the broader construction, encompassing vacancies that initially occur before the beginning of a recess, is the "only construction of the constitution which is compatible with its spirit, reason, and purposes; while, at the same time, it offers no violence to its language."

Noel Canning, 134 S. Ct. at 2568-69 (internal citations omitted).

Even under the Senate's interpretation of the statute, hypothetical machinations by the Governor are certainly possible. For example, if Governor McMaster appointed someone to fill this vacancy during the eleven days remaining in the recess during which Lord resigned, the Senate would have had the authority to reject the nomination of that person during the ensuing regular session. Then, under the second paragraph of section 1-3-210, Governor McMaster would then have the power to recess-appoint a different person to serve during the next recess, and the Senate could then again rightfully decline to confirm that person during the next regular session. In such a scenario, this succession of recess-appointed chairmen of the Board could easily decide to conduct all business of the Board during the roughly six-month recess of the Senate, and there would be nothing the Senate could do to stop it.

We believe the General Assembly intended to allow the Governor to fill the vacancy with a recess appointment and allow the Senate to make a confirmation decision during the ensuing legislative session. If the Senate declines to confirm, the Governor must start over. *See Noel Canning*, 134 S. Ct. at 2577 ("[T]he Recess Appointments Clause is not designed to overcome serious institutional friction. It simply provides a subsidiary method for appointing officials when the Senate is away during a recess. Here, as in other contexts, friction between the branches is an inevitable consequence of our constitutional structure. That structure foresees

resolution not only through judicial interpretation and compromise among the branches but also by the ballot box."). Our construction of section 1-3-210 allows the mechanics of the government to proceed. If we were to adopt the Senate's interpretation of the statute, and the Governor, for whatever reason, failed to make an appointment to a vacancy during the recess in which the vacancy initially arose, the Senate could hold the vacancy open in perpetuity and thwart the functioning of the government. We conclude this was not the intent of the General Assembly. We believe our reading of section 1-3-210 preserves the intent of the General Assembly to bestow the recess appointment power on the Governor, while, at the same time, retain for the Senate a significant check on that power. *See CFRE, L.L.C.*, 395 S.C. at 74, 716 S.E.2d at 881 ("[W]e read the statute as a whole and in a manner consonant and in harmony with its purpose."). Under our reading, the Governor retains the recess appointment power granted in the statute and the Senate retains the power to reject the Governor's appointee during the next regular session.

IV.

We hold section 1-3-210 authorized the Governor to make a recess appointment of Lord's successor during any recess of the Senate in which the vacancy existed. Such authority does not violate the doctrine of separation of powers. Accordingly, we hold that on July 23, 2018, Governor McMaster properly exercised his recess appointment power in appointing Condon as Chairman of the Board.

DECLARATORY JUDGMENT ISSUED.

BEATTY, C.J., KITTREDGE, HEARN, FEW and JAMES, JJ., concur.

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

The State, Respondent,

v.

Marshell Hill, Appellant.

Appellate Case No. 2016-000868

Appeal From Greenville County
Perry H. Gravely, Circuit Court Judge

Opinion No. 5605
Heard September 19, 2018 – Filed November 28, 2018

REVERSED AND REMANDED

Appellate Defender Kathrine Haggard Hudgins, of Columbia, for Appellant.

Attorney General Alan McCrory Wilson and Assistant Deputy Attorney General David A. Spencer, both of Columbia; and Solicitor William Walter Wilkins, III, of Greenville, all for Respondent.

HILL, J.: Marshell Hill appeals his voluntary manslaughter conviction, contending the trial court erred by admitting several statements the State obtained in violation of *Miranda v. Arizona*, 384 U.S. 436 (1966), into evidence. We reverse and remand.

I.

Around midday on August 14, 2013, Greenville County Sheriff's officers responded to a 911 call by Michael Barksdale from his home in the Judson Mill community. The first responding officer found Billy Patterson deceased outside the home. The officers interviewed Barksdale and spoke with his roommate, Hill, but deemed Hill too intoxicated to be questioned. Officers observed that Hill, who is disabled due to a hip injury, relied on a cane to walk. Hill repeatedly volunteered that Patterson had ripped off the screen door of the home. The officers photographed the scene and retrieved several samples of blood evidence from the patio, screen door, and other areas. After the officers determined Hill had an outstanding bench warrant for failure to appear, he was arrested and transported to the Law Enforcement Center (LEC).

The next morning, Lead Investigator Fortner, along with Investigator Bailey, attended Patterson's autopsy and learned the cause of death was blunt force trauma caused by repeated blows from a cylindrical object such as a broom handle or cane. The Investigators went to sign Hill out of detention to question him, only to discover he had been released earlier that morning. They then obtained a search warrant for Barksdale's house and drove there to execute it. Hill was there when they arrived, having walked home from the LEC. Hill testified he had consumed "over a pint" since returning home. During the search, the Investigators seized a wooden cane from Hill's bedroom. They then asked Hill to accompany them to the LEC so they could speak with him, promising to drive him back home later. Hill agreed.

The record is murky, but it appears the group arrived at the LEC around 3:00 p.m. The Investigators escorted Hill to a common work area for the homicide division, furnished with six desks and numerous chairs. No other people were present. Hill had not been handcuffed or advised he was in (or not in) custody. Rather than recording the interview, the Investigators typed a summary of Hill's statement on a "victim/witness" form, which reflected a time of 3:27 p.m. Hill explained in the statement that Patterson, a friend, came to Hill's house around 6 p.m, and they began drinking and watching television. Patterson later became unable to move, so Hill told him to lie on the floor. A few hours later, around 11 p.m., Barksdale came in from work and advised Hill to let Patterson "sleep it off." Soon thereafter, Patterson stood up and announced he was leaving but fell while holding the screen door, taking it to the ground with him. Hill and Barksdale managed to get Patterson back inside, where he slept a few more hours before leaving. Later in the night, Hill heard his dog barking, went outside, and saw Patterson sitting in the backyard next to the house. Hill came outside again around 9 or 10 a.m. and noticed Patterson now had an injury to his eye and black and blue marks on his back. Hill gave Patterson some

water. Around 11 a.m. or noon, Hill found Patterson had no pulse and asked Barksdale to call 911.

After Hill gave this statement, the Investigators left the room to confer, focusing on how Hill's version conflicted with Barksdale's. Fortner then resumed his questioning of Hill, recalling:

> So we went back and talked with Mr. Hill. I brought up the television set. It was pretty obvious that he liked his television. He spoke about it that day while we were there and he had mentioned something about it during the course of our interview. So then I asked him if Mr. Patterson had maybe tried to steal his television while he was there? And I could tell by his actions . . . he actually looked like he was about to cry. And he broke down and said that yes that he did. And then that he had tapped him twice.

At this point, the Investigators took Hill across the hall to a video interview room. The video, admitted as a State's exhibit, begins at 5:17 p.m. and runs forty-six minutes. The video shows Hill, whose sobriety was questionable, initialed but did not sign a set of warnings printed on a Waiver of Rights form. When asked by the Investigators if he could read the warnings, he explained he did not have his glasses. When Hill remarked the Investigators had "already told him" he could not go home, Bailey responded "we didn't tell you you couldn't go home; we told you we could not make that decision until we find out what you have to tell us." The Investigators advised Hill they could not talk any further with him about what happened unless he signed the form, but the statement they wanted from him was "no more than what you've already said." They assured Hill they would not throw him any "curveballs." When Hill commented that by signing the form he would be "signing his rights away," the Investigators advised he was not signing his rights away, just "waiving" them by "setting them aside," and that "your rights are still there." They told him he was "probably going to jail tonight." Hill commented "my cane must have matched the bruises." Hill then agreed to talk provided it was "off the record," a condition never clarified. Bailey left the room and called an assistant solicitor for an opinion on Hill's refusal to sign the form. Upon his return, he informed Hill the solicitor "said we can talk with you without you signing this," but there is no confirmation Hill understood the significance of the development. At the Investigators' prodding, Hill confessed he hit Patterson numerous times with his cane when he caught Patterson trying to steal his television.

After a *Jackson v. Denno*, 378 U.S. 368 (1964), hearing, the trial court observed the Investigators' questioning of Hill "turned" custodial after they conferred about the inconsistent evidence. The trial court, however, denied Hill's motion to suppress his statements. During Fortner's direct examination, Hill again objected to the admission of his statements made at the LEC. After hearing extensive arguments outside the jury's presence, the trial court concluded it was "a very close call" but again denied Hill's motion to suppress, finding Hill was not in custody when he gave the statements before being taken to the video interview room, where he voluntarily waived his *Miranda* rights.

II.

Hill appeals the trial court's admission of two of his statements: his first confession that he "tapped" Patterson twice and his second confession captured on video. According to Hill, the first statement was inadmissible because it was the product of a custodial interrogation conducted without the required *Miranda* warnings. He claims the second confession, although made after he was given *Miranda* warnings, was excludable because it was procured in violation of *Miranda* by the Investigators' use of the "question first" method forbidden by *Missouri v. Seibert*, 542 U.S. 600 (2004), and *State v. Navy*, 386 S.C. 294, 688 S.E.2d 838 (2010).

Statements made by a defendant during a custodial interrogation are inadmissible unless preceded by warnings from law enforcement informing the defendant of his *Miranda* rights. *See Berghuis v. Thompkins*, 560 U.S. 370, 380 (2010). The State bears the burden of proving the defendant was properly advised of his *Miranda* rights, voluntarily waived them, and freely made the statement. *See J.D.B. v. North Carolina*, 564 U.S. 261, 269-70 (2011). We review a trial court's custody ruling to determine if it is supported by the record. *See State v. Evans*, 354 S.C. 579, 583, 582 S.E.2d 407, 409 (2003).

A. The First Statement and Whether Hill Was In Custody

We first address Hill's statement that he "tapped" Patterson twice. There is no dispute Hill gave this statement while being interrogated without the benefit of *Miranda*, so the only issue is whether he was in custody when he made it.

A person is in custody if formally arrested or deprived of his freedom of action to a significant degree. *See Miranda*, 384 U.S. at 444; *Stansbury v. California*, 511 U.S. 318, 322 (1994). We must decide if a reasonable person—faced with the same circumstances confronting Hill—would have felt free to leave. *See Yarborough v. Alvarado*, 541 U.S. 652, 662 (2004). Hill testified he believed he was not free to

leave, but his subjective view is as weightless as the Investigator's conclusory testimony that Hill was not in custody. *See J.D.B*, 564 U.S. at 271 (the subjective views of investigating officers and person being questioned are irrelevant). Our inquiry is objective, centering on whether one in Hill's position would have believed he was free to stop the questioning and depart. *See id*. It entails reconstructing the circumstances of the interrogation, such as the time, place, purpose, and length of the questioning. *Evans*, 354 S.C. at 583, 582 S.E.2d at 410. Other factors include the use or absence of physical restraints, the statements made by the police, and whether the defendant was released at the end of the encounter. *Howes v. Fields*, 565 U.S. 499, 509 (2012).

Hill agreed to accompany the Investigators to the LEC, testifying he felt he had no choice, and it would have been "rude or disappointing" to refuse their invitation to transport him. Not every questioning at the police station is custodial, *see California v. Beheler*, 463 U.S. 1121, 1125 (1983); *State v. Williams*, 405 S.C. 263, 275, 747 S.E.2d 194, 200 (Ct. App. 2013), even if police view the person questioned as a suspect, *see Oregon v. Matthiason*, 429 U.S. 492, 495 (1977). But if the "invitation" is conditioned on the police escorting the defendant to the station, "a finding of custody is much more likely." 2 LaFave, et al., *Criminal Procedure* § 6.6(d) (4th ed. 2017). And if the police convey to the defendant that he is a suspect—by doubting his version of the events or presenting alternate versions based on other evidence they have collected—the atmosphere of the interrogation can objectively change to the point a reasonable person would think his freedom was restricted. *See Stansbury*, 511 U.S. at 325 (officer's view of an interviewee's culpability may bear on the custody analysis if manifested by word or deed to interviewee "and would have affected how a reasonable person in that position would perceive his or her freedom to leave").

Hill was isolated with the Investigators while at the LEC. He was not physically restrained but had only been released from jail a few hours earlier. There is no evidence the Investigators told Hill he could end the questioning at any time and leave. *See Yarborough*, 541 U.S. at 665 (facts that interview occurred at police station, lasted two hours, and defendant was never told he was free to leave "weigh in favor of the view that [the defendant] was in custody"). Bailey's testimony that Hill was told several times he could stop the questioning at any time was unspecific and appears to refer to the statements he made to Hill to that effect on the video after *Miranda* warnings were administered. In the video, Bailey also mentions an earlier, pre-*Miranda* exchange with Hill, stating "we didn't tell you you couldn't go home; we told you we could not make that decision until we find out what you have to tell

us." From this statement alone, it can be can be inferred a reasonable person would have concluded he was not free to leave.

Also striking is the distinct change in the purpose of the questioning. The State emphasizes Hill's initial statement at the LEC was memorialized on a "victim/witness" form, which it contends corroborates Hill was not in custody. But Hill does not challenge this statement; he even agreed he gave it voluntarily. Instead, he challenges what happened after the Investigators left the room to discuss the inconsistencies between Hill's version and Barksdale's and returned to extend the interrogation to pursue their hunch about Hill's possessive relationship with his television. Of course, the Investigators also knew from the autopsy that the cane they had seized from Hill could be the murder weapon. The video revealed the Investigators had earlier told Hill "we know what happened," and Fortner testified he was trained to confront witnesses with available evidence. This shift in investigatory purpose and technique echoes what occurred in *Navy*, where it marked the point the court found the defendant was in custody. 386 S.C. at 298, 688 S.E.2d at 840 (officer's follow-up questioning of suspect was informed by their knowledge of autopsy results, and "[a]t this juncture, the nature of the interrogation and respondent's status changed, and what had begun as a voluntary question and answer session matured into custodial interrogation"); *see also Evans*, 354 S.C. at 584, 582 S.E.2d at 410 (affirming custody finding, noting circuit court was "most concerned" by the change in purpose of questioning from routine to confrontational). Here, we agree with the trial court's initial instinct: when the Investigators realized Hill's statements conflicted with Barksdale's, "that is when they turned it into a custodial investigation."

The more than two hour length of the first unwarned questioning also points to a finding of custody. *Compare Evans*, 354 S.C. at 584, 582 S.E.2d at 410 (three hours; custody), *with Williams*, 405 S.C. at 275, 747 S.E.2d at 200 (fifteen to twenty minutes; no custody), *and Mathiason*, 429 U.S. at 495 (thirty minutes; no custody).

Viewing all these circumstances together and considering how a reasonable person would have perceived their impact on his freedom of movement, we conclude they add up to a finding that Hill was in custody when he stated he "tapped" Patterson twice. *See J.D.B.*, 564 U.S. at 270-71, 279.

B. The Second Statement and *Missouri v. Seibert*

We next consider whether Hill's video confession made after he was given *Miranda* warnings was admissible. Hill argues it was not, relying on *Seibert*, which involved the police strategy of "question first": questioning an unwarned suspect until he confesses, then delivering the *Miranda* warnings "midstream," and having the suspect repeat the confession. *Seibert*, 542 U.S. at 609-15. *Seibert* deemed this tactic undermined *Miranda*'s goal of reducing the risk of involuntary confessions procured by improper police pressure. *Id*. at 616-17. *Miranda* warnings were designed to ensure one being interrogated while in police custody is not only informed of his rights but informed under circumstances "allowing for a real choice between talking and remaining silent." *Id.* at 609. The "question first" tactic subverts this goal because one who is warned of his right to remain silent after he has already confessed is unlikely to think he retains a real choice to remain silent, making the midstream warnings meaningless. *Id*. at 612-14.

Deciding whether *Seibert* applies involves comparing the circumstances of the first and second questioning, including the completeness and detail of the questions and answers in the first round, the timing and setting of the first and second rounds, the continuity of police personnel, and the degree the police treated the second round as continuous with the first. *Id.* at 615. These factors aid in determining whether the midstream warnings could be effective or just reduce *Miranda* to a shibboleth.

The first and second interrogations of Hill were similar. The same Investigators conducted the second round, which was held in a room across the hall from where the first round had just ended. The Investigators treated the rounds as continuous, even telling Hill they only wanted him to tell them "no more than what you've already said." *See id.* at 616-17 ("The impression that the further questioning was a mere continuation of the earlier questions and responses was fostered by references back to the confession already given. It would have been reasonable to regard the two sessions as part of a continuum, in which it would have been unnatural to refuse to repeat at the second stage what had been said before."); *see also id*. at 621 (Kennedy, J., concurring) ("Reference to the prewarning statement was an implicit suggestion that the mere repetition of the earlier statement was not independently incriminating. The implicit suggestion was false."). We cannot suspend reality and find the *Miranda* warnings effective at the late stage they were given.

Navy made clear *Seibert* did not rest on whether the police deliberately used the "question first" tactic. *Navy*, 386 S.C. at 304, 688 S.E.2d at 842. Here, there is no direct evidence the Investigators set out to skirt *Miranda*, and it would be naïve to think we would find some. *Seibert*, 542 U.S. at 616 n. 6 (noting evidence of intent will rarely surface, "so the focus is on facts apart from intent that show the question-first practice at work"). However, this is not a situation like *Oregon v.*

Elstad, 470 U.S. 298, 301, 312-13 (1985), where a defendant's unwarned inculpatory statement—uttered in response to an arresting officer's offhand comment that he "felt" the defendant was involved in a burglary—did not render later *Miranda* warnings given to the defendant at the station ineffective. Here, we do not have a *Miranda* mistake made in the heat of arrest but a calculated investigatory interview structured by veteran homicide investigators who at times pitched Hill doubletalk. Justice Kennedy's concurrence in *Seibert* ventured such a *Miranda* breach could be cured if there was a substantial break in the time and environment of the first and second interviews, or if the defendant was advised his first confession could not be used against him. *Seibert*, 542 U.S. at 622. Neither occurred here.

We therefore hold *Seibert* requires exclusion of Hill's post-*Miranda* statements. *See Berkemer v. McCarty*, 468 U.S. 420, 437 (1984) ("Fidelity to the doctrine announced in *Miranda* requires that it be enforced strictly, but only in those types of situations in which the concerns that powered the decision are implicated.").

III.

As the trial court conscientiously recognized, the issues here are close, and they were not presented to the trial court in the most ideal or conspicuous form. From our perspective, however, the trial court's rulings find insufficient support in the record. We therefore hold the trial court erred by not excluding Hill's first and second confessions from evidence.

REVERSED AND REMANDED.

KONDUROS and MCDONALD, JJ., concur.

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

George Wetherill Clark, Respondent,

v.

Patricia Brennan Clark, Appellant.

Appellate Case No. 2015-002111

Appeal From Greenville County
Harry L. Phillips, Jr., Family Court Judge

Opinion No. 5606
Heard March 13, 2018 – Filed November 28, 2018

AFFIRMED IN PART AND REVERSED IN PART

Ken H. Lester and Catherine S. Hendrix, both of Ken Lester & Associates, of Columbia; and David Michael Collins, Jr., of Collins Law Firm, P.C., of Greenville, all for Appellant.

David Alan Wilson, of Wilson & Englebardt, LLC, of Greenville, for Respondent.

HILL, J.: In this appeal, Patricia Clark (Wife) argues the family court erred in (1) setting child support; (2) finding 75% of Pure Country, Inc. (PCI) was non-marital property; (3) valuing Wife's 25% interest in PCI at $75,000; and (4) refusing to order George Clark (Husband) to contribute to her attorney's fees. We affirm in part and reverse in part.

I.

In 2012, after twenty-five years of marriage, Husband sought a divorce from Wife on the ground of adultery. The parties had three children; one was still a minor at the time of filing. The parties met in 1982 at Emory University. Husband later obtained an MBA and worked for several businesses before joining PCI, his parents' and sister's company, in sales. He became president of PCI around 2001 after his mother stepped down. Wife began working for PCI a few years later, eventually becoming the art director. At the time of filing, Husband was the president of PCI and owned 75% of the stock; Wife owned the remaining 25%. The family court (1) granted the parties a divorce on the ground of one year's separation; (2) granted the parties joint custody and ordered Husband to pay Wife $744 a month in child support; (3) found Wife's adultery barred her from receiving alimony; (4) found Husband's 75% interest in PCI non-marital and valued Wife's 25% interest at $75,000; and (5) found each party responsible for their own attorney's fees.

II.

We review decisions of the family court de novo. *Stoney v. Stoney*, 422 S.C. 593, 596, 813 S.E.2d 486, 487 (2018). We may find the facts based on our view of the greater weight of the evidence. *Lewis v. Lewis*, 392 S.C. 381, 384, 709 S.E.2d 650, 651 (2011). This does not, however, require us to ignore the reality that the family court saw and heard the witnesses and was in a better position to gauge their credibility. The appellant bears the burden of convincing us the family court erred. Evidentiary and procedural rulings of the family court, however, are reviewed for an abuse of discretion. *Stoney*, 422 S.C. at 594 n.2, 813 S.E.2d at 486 n.2.

III.

Husband argues Wife did not timely serve her notice of appeal. We disagree.

Rule 203 of the South Carolina Appellate Court Rules requires Wife to serve her notice of appeal within thirty days of her receipt of written notice of entry of the order on appeal. She did. Wife received written notice of entry of the order denying her motion for reconsideration on September 11, 2015. Because October 11, 2015, was a Sunday, and October 12, 2015, was a federal holiday, Wife's deadline to file and serve her notice of appeal was October 13, 2015, and she served her notice of appeal on October 12, 2015, giving us jurisdiction. *See* Rules 262(a)(2) and 263(a), SCACR.

IV.

Wife argues the family court erred in refusing to deviate from the Child Support Guidelines when it awarded child support, contending the amount is inadequate and the family court should have imputed additional income to Husband. We disagree.

We must presume the guideline amount is correct; Wife may rebut this presumption by showing it is "unjust or inappropriate." S.C. Code Ann. § 63-17-470(A) (2010). "Deviation from the guidelines should be the exception rather than the rule." S.C. Code Ann. Regs. 114-4710 (Supp. 2018). The family court may impute income to a party with respect to awards of child support. *Jenkins v. Jenkins*, 401 S.C. 191, 203, 736 S.E.2d 292, 299 (Ct. App. 2012).

We find the family court did not err in refusing to impute additional income to Husband. Wife argues Husband underreported his income on his financial declaration, but there is insufficient support for this in the record. The family court excluded Wife's forensic accounting report of Husband's income and the expert's testimony regarding it because Wife did not produce the report within the discovery deadline. Wife admitted at the motion to reconsider hearing that the family court properly excluded the forensic accounting report. Wife did not present any documentary evidence supporting her argument that Husband's financial declaration was inaccurate.

The parties share joint custody. Wife does not offer any evidence of how the guideline amount is unjust or inappropriate. She does not point to any expenses or outstanding needs of Child she will be unable to cover. Wife did not prove any statutory factors or present any evidence warranting a deviation. *See* S.C. Code Ann. § 63-17-470(C) (2010) (setting forth factors family court can consider for deviation from the guidelines). We therefore affirm the family court's child support order.

V.

Wife next challenges the equitable distribution award, arguing the family court erred in finding Husband's 75% share of PCI was non-marital property. We disagree. A party who claims property acquired during the marriage is non-marital bears the burden of proving the property is non-marital. *Brandi v. Brandi*, 302 S.C. 353, 356, 396 S.E.2d 124, 126 (Ct. App. 1990). Thus, Husband bore the burden of proof at trial. However, Wife has not shown the family court's finding that PCI was a non-martial asset was against the greater weight of the evidence. *See Lewis*, 392 S.C. at 384, 392, 709 S.E.2d at 651–52, 655 (stating the appellant bears the burden

of proving the family court committed error or that the greater weight of the evidence is against the court's findings).

When Husband joined PCI, his Mother and Father each owned 37.5% of the shares, and his sister owned the remaining 25%. When Mother died in 2002, many of her assets, including her PCI shares, flowed to what is known as an "AB" Trust, designed to reduce tax liability. Husband testified without contradiction that Father, as Trustee, filled Trust A to the maximum allowable amount with assets other than Mother's PCI shares, which then automatically went into Trust B. This transferred Mother's shares to Father, the beneficiary of Trust B. After Mother's death, Husband's sister and brother sued Father and Husband, challenging Father's competency and seeking to wrest control of the company from Father and Husband.

While this suit was pending, two important events occurred. First, as Husband testified, Father had once intended to give PCI to all three of his children, but given the lawsuit, he decided to gift it to Husband only. There was no evidence Father wished to include Wife in this bequest or otherwise give her any ownership in PCI. Second, Husband's sister agreed to sell her 25% share to the company and drop the lawsuit. Granted, the evidence was far from seamless, and Husband contradicted himself more than once on the timelines and details of the company ownership, but PCI's corporate tax returns for 2003 show Husband owned 75% of the company's shares. In her testimony, Wife acknowledged Husband's ownership without conceding PCI was non-marital.

Beginning in January 2006, several tragedies befell Husband. His brother was murdered by his sister's husband, with his sister later being convicted as an accessory. Later that year, Father died. By 2008, PCI was under financial pressure. Husband's financial and family woes sent him into profound depression. Meanwhile, Wife began an affair with a PCI employee who reported to her. Wife testified the relationship was an "arrangement," and Husband had agreed to allow her a "sexual surrogate." In 2010, while still pursuing her affair, Wife asked Husband for ownership of part of PCI. Husband testified Wife was concerned about protecting their children's inheritance should anything happen to Husband, telling him PCI was "clearly yours. It's a family business." Acting on behalf of PCI, Husband gave Wife a 25% interest in PCI, memorialized in a stock transfer agreement that included Wife's acknowledgment that the agreement could not be construed as giving Wife "any right to be awarded any further stock other than in the

sole discretion of the Board of Directors of the Company." In 2012, Husband learned of the affair when he discovered a salacious picture Wife's lover had texted her. Shortly thereafter, Husband fired them both from PCI. The family court found Wife's assertions that Husband knew of and consented to her adultery incredible, a finding not challenged on appeal.

The trial lasted eight days. After hearing the evidence and sizing up the witnesses, the family court found Father intended to gift PCI to Husband, and therefore ruled Husband's 75% interest non-marital.

Our supreme court has held a spouse's testimony alone, absent evidence to the contrary, is sufficient to establish the non-marital nature of property. *See Wilburn v. Wilburn*, 403 S.C. 372, 385–86, 743 S.E.2d 734, 741 (2013) (rejecting argument that testimony of spouse asserting bank account was non-marital must be supported by documentary evidence). Here, Husband testified Father gifted PCI to him, therefore providing the only direct evidence in the record concerning ownership of PCI. *See Fuller v. Fuller*, 370 S.C. 538, 551–52, 636 S.E.2d 636, 643 (Ct. App. 2006) (finding a party's interest in a company was not a gift because he did not offer any evidence "by way of check or testimony"). He testified it was a gift from his Father and explained his Father's compelling reasons for the gift. Husband testified Father had signed his shares over to Husband, noting the transaction was "not ceremonial." *See Barr v. Barr*, 287 S.C. 13, 15, 17, 336 S.E.2d 481, 483–84 (Ct. App. 1985) (discussing similar issue regarding whether alleged gift from father to child was a gift; this court noted family court's superior position to gauge credibility and affirmed the ruling that the transaction was a gift). We find Husband's testimony regarding Father's gift, coupled with the evidence of Wife's stock transfer agreement that restricted the terms of Wife's 25% interest in PCI, sufficient to prove Husband's interest in PCI was not marital property. *See Smith v. Smith*, 386 S.C. 251, 270, 687 S.E.2d 720, 730 (Ct. App. 2009) (finding property non-marital based on testimony, financial records, and lack of evidence of the parties treating it as martial property during their marriage).

Wife did not directly contradict Husband's version of how he came to own PCI. Instead, she offered the testimony of her financial expert, who opined PCI was marital property. Wife's expert highlighted the absence of any gift tax return. He tried to show Husband, while President of PCI, purchased Father's shares by using company funds to pay for a cruise and an RV for Father, items that cost around

$160,000.00. According to Wife's expert, this compensation was consideration for Father's transfer of the PCI stock, meaning no gift occurred. The logic of this argument is fuzzy. If Father sold the stock rather than gifted it, he necessarily sold it back to PCI. If Wife's expert's theory is right, then the sale was a bargain because he noted Mother's estate inventory valued her 37.5% of shares at $340,000, meaning Father would have sold 75% of the shares for $160,000, shockingly less than the estate valuation or the $1.8 million value Wife's expert placed on PCI. Even if we bought into this speculative lark, such bargain sales are treated by the IRS as partial gifts. *See* 26 I.R.C. § 2512(b) (2011). Wife's expert also claimed Father was compensated through increased lease payments from PCI and the use of a company credit card, but neither of these theories had anything but innuendo to back them up. Wife's expert's conclusions were unhinged on cross-examination when it became apparent much of his analysis rested on a misconception of the mechanics of Mother's trust.

Like the family court, we find Wife's request for part ownership of PCI and the 25% stock transfer to her revealing. This transaction makes no sense if Wife believed PCI was marital property. People do not generally try to bargain for ownership of things they believe they already own in full. Nor do they, after receiving part, put in writing their acknowledgment that they have no further right to the whole. The 25% transferred to Wife became marital property, and the transaction corroborates Husband's claim that the remaining 75% was his separate property acquired by gift from Father rather than through the efforts of the marriage.

Lastly, Husband's lack of compliance with the gift tax laws, however inexcusable, is not dispositive. *See Smith*, 386 S.C. at 268 n.3, 687 S.E.2d at 729 n.3 (providing the failure to file a gift tax return "is not dispositive on the issue of whether a gift was actually given").

For all these reasons, we affirm the family court's finding that 75% of PCI was Husband's non-marital property not subject to equitable distribution.

VI.

Wife contends the family court erred in valuing PCI and in applying both a marketability discount and a lack of control discount in valuing Wife's 25% interest.

We disagree that the family court erred in valuing PCI as a whole but agree it erred in valuing Wife's 25% interest.

When valuing business interests, the family court is required to determine the fair market value of the business as an ongoing concern by considering the business's net value, the fair market value for its stock, and its earnings or investment value. *Reid v. Reid*, 280 S.C. 367, 373, 312 S.E.2d 724, 727 (Ct. App. 1984); *see also Santee Oil Co. v. Cox*, 265 S.C. 270, 273, 217 S.E.2d 789, 791 (1975).

Husband's expert, Catherine Stoddard, CPA, appraised PCI using the methods of asset value, fair market value, and earnings or investment value and assigned relative weight to each method. Because PCI was not going to be sold, she gave the asset valuation method only 10% weight. She gave the market value approach 10% weight, as there were insufficient comparable sales. She gave the investment approach the remaining 80% weight. Using a capitalization of earnings or investment method, Stoddard determined PCI's fair market value to be $465,461, and therefore, a 25% interest to be $116,365. She then applied a 35% marketability discount to the 25% interest, resulting in a fair market value of $75,637.

a. Valuation of PCI as a whole

The family court adopted Stoddard's valuation of PCI, finding it was more thorough, better reasoned, and more credible than Wife's expert's valuation. We agree. Stoddard more accurately examined PCI's history and business. She analyzed PCI's tax returns to obtain the income for her valuation, whereas Wife's expert adjusted PCI's financials by comparing them to companies whose similarity to PCI was dubious. Wife's expert questioned the reliability of PCI's financial records, but never pointed to concrete examples supporting his premise.

We reject Wife's argument that the family court should have placed more weight on Husband's purchase on behalf of PCI of his sister's shares for $400,000 payable over fourteen years without interest. Husband testified family distress drove this purchase; at the time, his sister and brother were suing their father for control of PCI, and he bought his sister's interest in hopes of healing the family discord. This sale does not represent the fair market value of the 25% interest because of the family dynamics crowding the transaction. Therefore, we affirm the family court's valuation of PCI.

b. Marketability discount

Wife argues *Moore v. Moore*, 414 S.C. 490, 779 S.E.2d 533 (2015), prohibits any marketability discount. *Moore*, decided after the family court's ruling here, held a marketability discount inapplicable when one spouse retained ownership of the business. *Id.* at 525, 779 S.E.2d at 551. Husband has no plans to sell PCI. Therefore, to the extent the marketability discount reflected an anticipated sale, *Moore* deems it a fiction South Carolina law no longer recognizes.

Stoddard also based the marketability discount on the stock restriction attached to the 25% interest that limits transferability to certain family members and other insiders. As Stoddard explained, the restriction narrows the market for the stock to a handful of people, impairing the owner's ability to convert it into cash. It may be that Husband, as controlling shareholder, could remove the restriction on the shares once he owned them, but the record is silent as to this power. If, though, Husband has no plans to sell PCI then the stock restriction's effect on value is just as phantom as the discount rejected in *Moore*; both concern liquidity, which *Moore* held irrelevant to the fair market value of a closely held business for equitable distribution purposes when one spouse intends to retain ownership. We therefore hold use of the marketability discount improper under these specific facts.

c. Minority or lack of control discount

Wife contends that by discounting the value of the 25% interest in PCI for lack of control, and then awarding the stock to Husband, the majority and controlling shareholder, the family court provided a windfall to Husband. Wife relies on *Fields v. Fields*, which affirmed the family court's refusal to discount the value of a wife's 18% interest in a family company where her father owned the remaining 82%. 342 S.C. 182, 189–90, 536 S.E.2d 684, 687–88 (Ct. App. 2000). *Fields* held the family court did not abuse its discretion by agreeing with Husband's expert that the minority interest was worth more in Wife's hands than Husband's given Wife's father's animus toward Husband and the likelihood of the father's attempts to "squeeze" the minority interest if Husband retained it. *Id*.

Fields is best limited to its facts and cannot be read as barring discounting the value of a spouse's minority interest anytime the other spouse owns (or is aligned with the owner of) a majority of the closely held business. *See* Pratt, *Business Valuation Discounts and Premiums* (2d Ed. 2009) at 38 (noting some equitable distribution cases have "reasoned that the minority owner actually has a share of control through family or other operating owners, although this logic generally leads to bad economic decisions and should not form the basis for any valuation adjustment"). Wife cross-examined Stoddard based on such a reading, but did not refer to *Dowling*

v. S.C. Tax Commission, 312 S.C. 194, 439 S.E.2d 825 (1993), a gift tax case much more on point. Persuaded by the use of minority discounts by the IRS, *Dowling* affirmed a 30% discount to the value of each of the 20% shares gifted to five children, and "decline[d] to hold that as a matter of state law, minority stock discounts for family-held corporations are not allowed." *Id*. at 198–99, 439 S.E.2d at 828.

Marital assets must be assigned their fair market value, which means by the rationality and objectivity of the market rather than the subjective eye of the ultimate beholder, the distributee spouse. Because valuation must precede distribution, the family court cannot place different values on the same asset depending on which spouse receives it. To do so would upend both the concepts of fair market value and equity, and ignore the requirement that assets be valued as of the filing date. We can envision, for example, a situation where a controlling shareholder spouse embroiled in a divorce may wish to pay more than fair market value for a minority interest held by the other spouse simply to remove that spouse from any ownership position. But valuing assets in such manner needlessly complicates the family court's already difficult tasks and adds the vagaries of opportunity cost and other variables to the process, distorting the concept of fair market value. *See* Pratt, *supra*, at 10 (noting the model of the hypothetical seller and buyer underlying the fair market value standard is "intended to eliminate the influence of one buyer's or seller's specific motivations").

Wife is in essence advocating adoption of a "fair value" standard for her minority shares of closely held corporate stock, rather than "fair market value." Put another way, Wife maintains the business should be valued as a whole and the shares awarded their pro-rata value without any discount. To be sure, some states have banished the minority discount as incompatible with "fair value," often in the context of dissenter's rights litigation. *See Cavalier Oil v. Harnett*, 564 A.2d 1137, 1145 (Del. 1989); *see also* S.C. Code Ann. § 33-13-102 (2006); Heglar, *Rejecting the Minority Discount*, 1989 Duke L.J. 258 (1989). Some liken a spouse holding minority ownership of a family business in the divorce context to a dissenting minority shareholder: both are under some degree of pressure, and often must sell their interest to the controlling owner. *See, e.g., Grelier v. Grelier*, 44 So.3d 1092, 1097–99 (Ala. Civ. App. 2009); *Congel v. Malfitano*, 101 N.E.3d 341, 357–66 (N.Y. 2018) (Fineman, J., dissenting) (canvassing policy reasons for abolishing minority discounts in partnership dissolution); Miller, *Discounts and Buyouts in Minority Investor LLC Valuation Disputes Involving Oppression or Divorce*, 13 U. Pa. J. of Bus. L. 607, 633–38 (2011). It can also be argued that discounts run counter to the

view of marriage as an economic partnership whose assets are to be divided equitably in the event of dissolution.

But in the realm of equitable division in our state, we are bound by the standard of "fair market value" rather than "fair value." And many jurisdictions continue to discount the fair market value of minority stock ownership when equitably dividing marital estates. *See, e.g.*, *Schickner v. Schickner*, 348 P.3d 890, 895 (Ariz. Ct. App. 2015); *Arneson v. Arneson*, 355 N.W.2d 16, 22 (Wis. Ct. App. 1984); *Hanson v. Hanson*, 125 P.3d 299, 308–09 (Alaska 2005); *Rattee v. Rattee*, 767 A.2d 415, 420–21 (N.H. 2001); *Siracusa v. Siracusa*, 621 A.2d 309, 314–15 (Conn. App. Ct. 1993); *cf*. *McCulloch v. McCulloch*, 69 A.3d 810, 823 (R.I. 2013) (approving the use of minority discounts, but noting they are unnecessary when a spouse receives cash equivalent rather than in kind distribution of the minority interest). The most cited decision rejecting minority discounts appears to be *Brown v. Brown*, 792 A.2d 463 (N.J. Super. Ct. App. Div. 2002), but New Jersey uses a "fair value" standard, and even that court agreed minority discounts could apply in extraordinary circumstances. *Id*. at 490; *see also Grelier*, 44 So.3d 1092, 1097–99 (following *Brown*).

Stoddard valued the 25% interest using a capitalization of earnings method that took into account the minority position. This is a crucial point. The earnings method requires the appraiser to establish a company's income stream, which is then used as a benchmark for the valuation. Stoddard chose to accept PCI's income stream "as is" in one important respect: she did not adjust the abnormally high owner's compensation and other discretionary ownership benefits. As her report noted, she could have chosen to reduce the owner's compensation and benefits to industry norms. This would have increased PCI's net income stream, to which she would have then applied a minority or lack of control discount to Wife's 25% interest. Instead, Stoddard chose to not adjust the income stream in this regard, removing any need to later apply a minority discount. As Stoddard noted, a lack of control discount inheres in the unadjusted stream because a minority owner has no ability to reduce or change the owner's compensation or benefits. However, this approach to valuing PCI's income stream resulted in an effective minority discount of 44%.

We hold a minority or lack of control discount may be considered when valuing a minority interest in a closely held business as part of the equitable division of the marital estate. We find the discount appropriate here because a holder of Wife's 25% interest would have no control over the company. Although Husband is retaining Wife's interest under the family court's order, fair market value assumes a hypothetical sale between a willing buyer and a willing seller. Husband is already

the controlling shareholder, so obtaining Wife's 25% interest does not augment his control. Because Wife's minority interest is worth less than a pro-rata share of the company as a whole, it was proper to discount the value, as the market surely would.

Nevertheless, we find an effective 44% minority discount excessive. We find a 30% minority discount proper, which Stoddard acknowledged would be more in line with market ranges. Applying a 30% minority discount results in a $132,656 value for Wife's interest.

VII.

We therefore reverse the family court's valuation of Wife's 25% share of PCI, and order Wife be awarded $132,656 for her interest. We affirm the remainder of the family court's rulings, including the denial of attorney's fees to Wife.

AFFIRMED IN PART AND REVERSED IN PART.

SHORT and THOMAS, JJ., concur.