The Supreme Court of South Carolina

DANIEL E. SHEAROUSE
CLERK OF COURT

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CHIEF DEPUTY CLERK

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March 7, 2012

NOTICE

The State of South Carolina, through the Committee established under S.C. Code Ann. § 14-3-820 (1976), is soliciting proposals to publish the South Carolina Reports for a five (5) year term beginning July 1, 2012. The South Carolina Reports is the official publication of the opinions of the Supreme Court of South Carolina and the South Carolina Court of Appeals.

The South Carolina Reports is published on a periodic basis averaging five to six volumes per year plus approximately five or six Advance Sheets per volume. Each volume contains approximately 650 pages. The State currently purchases approximately 160 copies of each volume. Proposals should specify a per book price for the copies purchased by the State. The quoted price should include the Advance Sheets and delivery to Columbia, South Carolina. The publisher can market additional volumes to attorneys and the general public.

For a sample of the style and format to be used, see Volume 394 of the South Carolina Reports. The successful publisher must either obtain a copyright waiver from Thomson Reuters (the current publisher) to continue to include the West headnotes, or include in the proposal a detailed description of how it proposes to prepare headnotes for each case in the Reports which are comparable in functionality to those contained in the current Reports.

Proposals should be submitted in writing on or before April 9, 2012. Proposals and any questions should be directed to the Clerk of the Supreme Court of South Carolina at the above address. The Committee reserves the right to reject any and all proposals.

The Supreme Court of South Carolina

In the Matter of Richard Lee Eaton, Jr., Deceased.

ORDER

Pursuant to Rule 31, RLDE, of Rule 413, SCACR, the Office of Disciplinary Counsel seeks an order appointing an attorney to take action as appropriate to protect the interests of Mr. Eaton and the interests of Mr. Eaton's clients.

IT IS ORDERED that Margaret A. Collins, Esquire, is hereby appointed to assume responsibility for Mr. Eaton's client files, trust account(s), escrow account(s), operating account(s), and any other law office accounts Mr. Eaton may have maintained. Ms. Collins shall take action as required by Rule 31, RLDE, to protect the interests of Mr. Eaton's clients and may make disbursements from Mr. Eaton's trust, escrow, and/or operating account(s) as are necessary to effectuate this appointment.

This Order, when served on any bank or other financial institution maintaining trust, escrow and/or operating account(s) of Richard Lee Eaton, Jr., Esquire, shall serve as notice to the bank or other financial institution that Margaret A. Collins, Esquire, has been duly appointed by this Court.

Finally, this Order, when served on any office of the United States Postal Service, shall serve as notice that Margaret A. Collins, Esquire, has been duly appointed by this Court and has the authority to receive Mr. Eaton's mail and the authority to direct that Mr. Eaton's mail be delivered to Ms. Collins' office.

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

s/ Jean H. Toal C.J.
FOR THE COURT

Columbia, South Carolina
February 29, 2012

The Supreme Court of South Carolina

In the Matter of Eugene J. Laurich, Deceased.

ORDER

Pursuant to Rule 31, RLDE, of Rule 413, SCACR, the Office of Disciplinary Counsel seeks an order appointing an attorney to take action as appropriate to protect the interests of Mr. Laurich and the interests of Mr. Laurich's clients.

IT IS ORDERED that Catherine West Olivetti, Esquire, is hereby appointed to assume responsibility for Mr. Laurich's client files, trust account(s), escrow account(s), operating account(s), and any other law office accounts Mr. Laurich may have maintained. Ms. Olivetti shall take action as required by Rule 31, RLDE, to protect the interests of Mr. Laurich's clients and may make disbursements from Mr. Laurich's trust, escrow, and/or operating account(s) as are necessary to effectuate this appointment.

This Order, when served on any bank or other financial institution maintaining trust, escrow and/or operating account(s) of Eugene J. Laurich, Esquire, shall serve as notice to the bank or other financial institution that Catherine West Olivetti, Esquire, has been duly appointed by this Court.

Finally, this Order, when served on any office of the United States Postal Service, shall serve as notice that Catherine West Olivetti, Esquire, has been duly appointed by this Court and has the authority to receive Mr. Laurich's mail and the authority to direct that Mr. Laurich's mail be delivered to Ms. Olivetti's office.

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

s/ Jean H. Toal C.J.
FOR THE COURT

Columbia, South Carolina
February 29, 2012

The Supreme Court of South Carolina

RE: Lawyers Suspended by the South Carolina Bar

O R D E R

The South Carolina Bar has furnished the attached list of lawyers who have been administratively suspended from the practice of law pursuant to Rule 419(b)(1), SCACR, since February 1, 2012. This list is being published pursuant to Rule 419(d)(1), SCACR. If these lawyers are not reinstated by the South Carolina Bar by April 1, 2012, they will be suspended by order of the Supreme Court and will be required to surrender their certificates to practice law in South Carolina. Rule 419(e)(1), SCACR.

Columbia, South Carolina

March 6, 2012

Attorneys Suspended for Nonpayment of 2012 License Fees
As of March 1, 2012

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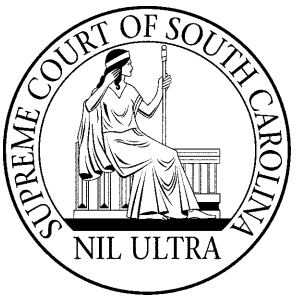

OPINIONS

OF

THE SUPREME COURT

AND

COURT OF APPEALS

OF

SOUTH CAROLINA

ADVANCE SHEET NO. 9
March 7, 2012
Daniel E. Shearouse, Clerk
Columbia, South Carolina
www.sccourts.org

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2011-UP-468-James v. State	Pending
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2011-UP-483-Deans v. SCDC	Pending
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2011-UP-514-SCDSS v. Sarah W.	Pending
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2011-UP-581-On Time Transp. v. SCWC Unins. Emp. Fund	Pending

THE STATE OF SOUTH CAROLINA
In The Supreme Court

Kim Murphy, Appellant,

v.

South Carolina Department of Health and Environmental Control and District 5 of Lexington and Richland Counties, Respondents.

Appeal from Richland County
Carolyn C. Matthews, Administrative Law Court Judge

Opinion No. 27099
Heard January 11, 2012 – Filed March 7, 2012

AFFIRMED

Katie Renee Parham, The Parham Law Firm, of Irmo, and Robert Guild, of Columbia, for Appellant.

M. Elizabeth Crum & Pamela A. Baker of McNair Law Firm, of Columbia, and Stephen P. Hightower and Roger P. Hall, of Columbia, for Respondents.

Amy E. Armstrong and Michael G. Corley, of Pawleys Island, for Amicus Curiae, South Carolina Wildlife Federation.

James B. Richardson, Jr, of Columbia, for Amicus Curiae, Mining Association of South Carolina.

JUSTICE HEARN: This case centers on proposed renovations to the overcrowded Chapin High School, which require filling in a portion of a stream on the property. District 5 of Lexington and Richland Counties received a Section 401 water quality certification (WQC) from the Department of Health and Environmental Control (DHEC), authorizing the project and allowing the District to fill the approved portion of the stream. The Administrative Law Court (ALC) affirmed the certification, and Kim Murphy appeals, arguing the ALC erred in determining that the vicinity of the project included the area surrounding the proposed fill, failing to find that the project would damage the surrounding ecosystem, and finding no feasible alternatives to the proposed project. She also alleges DHEC impermissibly abdicated its decision-making authority to the District. We find no error in the ALC's analysis or in DHEC's evaluation of the project and accordingly affirm.

FACTUAL/PROCEDURAL BACKGROUND

Chapin High School, which is located in District 5 of Richland and Lexington Counties, was built in 1971 and designed to accommodate 600 pupils. Over the years, the surrounding areas have swelled in population, causing the number of students to far exceed the original building's capacity, with enrollment for the 2009-10 school year reaching approximately 1,350 students. To accommodate this growth of the student body, the District proposed an expansion of the school which would increase its capacity to 1,700 students. Because the District already owned adjacent property, it sought to undertake this expansion using that land. The proposed expansion included increasing the number of practice fields and parking lots, making

improvements to the wastewater collection system, and installing stormwater controls, all of which would necessitate the filling of a portion of a stream located upon the property. This stream is part of an unnamed tributary that flows into Wateree Creek.

Because the stream was classified by the Army Corps of Engineers as waters of the United States, the District was required to obtain a WQC[1] from DHEC, which is a prerequisite to obtaining a 404 Discharge Permit[2] from the Corps. Section 61-101 governs the issuance of the WQC and requires that DHEC deny certification if, *inter alia*, the "proposed activity permanently alters the aquatic ecosystem in the vicinity of the project such that its functions and values are eliminated or impaired" or "there is a feasible alternative to the activity" with less adverse consequences. 25A S.C. Code. Ann. Regs. 61-101.F.5(a)&(b) (Supp. 2011). Over the next few months, DHEC and the Corps periodically requested additional information and modifications from the District. During this time, the District engaged in further studies of alternatives, and it eventually reduced the length of the stream it sought to fill from 1,501 feet to 727 feet by eliminating a practice field and reducing the number of parking spaces created for students. The

[1] Section 401 of the Clean Water Act, 33 USC § 1341, provides that to obtain a Federal permit for discharge, an applicant must first obtain a certification from the applicable state agency that the discharge complies with sections 1311, 1312, 1316, and 1317 of the Act. To comply with this mandate, South Carolina enacted Regulation 61-101 to establish the certification requirements.

[2] An entity that intends to fill a portion of waters of the United States must obtain a permit prior to the filling pursuant to section 404 of the Clean Water Act. The permit, also known as a 404 Discharge Permit, is issued by the Corps based upon an evaluation under the Guidelines for Specification of Disposal Sites for Dredged or Filled Material, which are codified at 40 C.F.R. § 230 (2011) and commonly referred to as the 404(b)(1) Guidelines.

District's plan also included implementing stormwater controls to improve the quality of water as it flowed downstream.[3]

About eight months after the District applied for the WQC, DHEC issued a staff assessment recommending that the District be issued the certification. Kim Murphy, who lives near Wateree Creek and was at the time the mother of two Chapin High School students and one Chapin High School graduate, sought review of this assessment before the Board of Health and Environmental Control. The Board declined review, and the staff assessment became DHEC's final decision. DHEC then advised the Corps that it had issued the WQC, and the Corps, upon completing its review of the District's application, issued the Discharge Permit.[4]

Murphy requested a contested case hearing before the ALC arguing that DHEC had erred in applying Regulation 61-101 by concluding that the proposed fill would not detrimentally alter the aquatic ecosystem in the vicinity of the project, that there were no feasible alternatives with less adverse impacts, and that the project as proposed sufficiently minimized the impact to the ecosystem. In support of her argument, Murphy presented expert testimony on the existence of feasible alternatives and the negative impact that would result to the ecosystem if this fill took place. She also questioned the independence of DHEC's review due to its concurrence with many of the findings of the District's engineers and its acceptance of the District's claimed needs. DHEC and the District (collectively, Respondents) submitted evidence supporting the minimized impact of the proposed plan and demonstrating why the particular plan was chosen over other alternatives.

The ALC specifically rejected Murphy's claim that in considering the "vicinity of the project" under Regulation 61-101, DHEC's inquiry should have been limited to the 727 feet of stream the District proposed to fill. Accordingly, it found that the functions and values of the stream in the

[3] Because Chapin High School was built prior to the enactment of any state and local requirements for stormwater discharge, there are no stormwater controls on the school site.

[4] The issuance of this permit has not been challenged.

vicinity would not be eliminated or impaired by the fill. Additionally, in determining whether feasible alternatives to the project existed, the ALC used the 404(b)(1) Guidelines' word "practicableness" as an equivalent to the undefined word "feasible." Under the Guidelines, an alternative is practicable if "it is available and capable of being done after taking into consideration cost, existing technology, and logistics in light of overall project purposes." 40 C.F.R. § 230.10(a)(2). Applying this definition, the ALC concluded that there were no feasible alternatives. The ALC therefore affirmed the certification and this appeal followed.

ISSUES PRESENTED

I. Did the ALC err in its construction of Regulation 61-101?

II. Did the ALC err in finding that there are no feasible alternatives to the project and in its use of the 404(b)(1) Guidelines found in 40 C.F.R. § 230?

III. Did DHEC improperly delegate its decision-making authority to District 5?

STANDARD OF REVIEW

The Administrative Procedures Act establishes the standard of review this Court applies to appeals from the ALC. Section 1-23-610(D) of the South Carolina Code (2010) provides that the Court may reverse or modify the ALC's decision only if the substantive rights of a party have been prejudiced due to constitutional or statutory violations; an agency exceeding its authority; unlawful procedure; an error of law; a clearly erroneous view of evidence in the record; or an abuse of discretion. "As to factual issues, judicial review of administrative agency orders is limited to a determination [of] whether the order is supported by substantial evidence." *MRI at Belfair, LLC v. S.C. Dept. of Health & Envtl. Control*, 379 S.C 1, 6, 664 S.E.2d 471, 474 (2008). When finding substantial evidence to support the ALC's decision, the Court need only determine that, based on the record as a whole,

reasonable minds could reach the same conclusion. *Hill v. S.C. Dept. of Health & Envtl. Control*, 389 S.C. 1, 9-10, 698 S.E.2d 612, 617 (2010).

LAW/ANALYSIS

I. REGULATION 61-101

Murphy first contends that the ALC erred in both its construction of Regulation 61-101 and in its application.

A. Interpretation of the Regulation

Murphy argues that the ALC erred in interpreting the use of the word "vicinity" to include more than the project area of 727 feet of stream. We disagree.

Regulations are interpreted using the same rules of construction as statutes. *See S.C. Ambulatory Surgery Ctr. Ass'n v. S.C. Workers' Comp. Comm'n*, 389 S.C. 380, 389, 699 S.E.2d 146, 151 (2010) "When interpreting a regulation, we look for the plain and ordinary meaning of the words of the regulation, without resort to subtle or forced construction to limit or expand the regulation's operation." *Converse Power Corp. v. S.C. Dept. of Health & Envtl. Control*, 350 S.C. 39, 47, 564 S.E.2d 341, 346 (Ct. App. 2002).

Regulation 61-101 states, "Certification will be denied if (a) the proposed activity permanently alters the aquatic ecosystem in the vicinity of the project such that its functions and values[5] are eliminated or impaired." 25A S.C. Code Ann. Regs. 61-101.F.5(a) (Supp. 2011). Although vicinity is not defined in the regulations, we interpret an undefined term in accordance with its usual and customary meaning. *Branch v. City of Myrtle Beach*, 340 S.C. 405, 409-10, 532 S.E.2d 289, 292 (2000). Merriam-

[5] "Functions and values" are terms of art. According to Murphy's expert in watershed ecology, Dr. Tufford, "functions" refers to the ecological processes occurring at a location while "values" refers to the benefits that humans derive from a natural system.

Webster defines vicinity as meaning "the quality or state of being near: proximity" or "a surrounding area or district: neighborhood." Merriam-Webster Dictionary, http://www.merriam-webster.com/dictionary/vicinity. Using this accepted meaning of the word vicinity, the regulation clearly includes more than just the project; it logically incorporates the surrounding area. Moreover, a reading to the contrary would render it impossible to ever obtain a certification to fill a portion of a stream as the functions and values of that area would always necessarily be eliminated.

Furthermore, we give deference to the interpretation of a regulation by the agency charged with it enforcement. *See Brown v. Bi-Lo, Inc.*, 354 S.C. 436, 440, 581 S.E.2d 836, 838 (2003). During her testimony, Jennifer Haynes, who had been the DHEC project manager for the Chapin High School WQC, clarified that DHEC interpreted the "vicinity of the project" on a case by case basis according to its best professional judgment as each project is different. Thus, Haynes testified that when applying Regulation 61-101, she "considered the vicinity [to include] more than just the 727 feet of stream" and noted that although she did not have an exact area, it included many miles. Because this interpretation is both reasonable and consistent with the plain language of the regulation, we see no reason to deviate from DHEC's construction and application.

B. Application of Regulation 61-101

Additionally, Murphy argues that even evaluating an area greater than the 727 feet to be filled, the ALC erred in finding that the functions and values would not be impaired and thus certification was improper. We, however, find the ALC's decision supported by substantial evidence in the record.

Both experts for Murphy and for the District concluded that the quality of the stream as it currently exists is poor[6] and it lacks stormwater controls.

[6]Dr. Tufford performed a Stream Visual Assessment Protocol which determines the ecological integrity and status of streams. After dividing the stream into five segments, he analyzed each one separately and gave each

The proposed project would include the use of detention ponds to manage the flow of stormwater which would actually improve the quality of the water in the stream.[7] The District also agreed to use a velocity attenuator which would slow the flow of the water from the stormwater trunk line thereby reducing the amount of sediment or other solids that reached the unnamed tributary and eventually Wateree Creek.

Furthermore, even though Dr. Tufford opined that filling the portion of the stream may have some impact on the functions and values of the Wateree Creek system, he acknowledged that ecosystems can adapt and that the nature and extent of the impact was difficult to determine without further study. While he also expressed some concern that the lower portions of the stream may dry up except during rain events, the District, in response, agreed to create a preferential pathway to maintain the flow of the water down to the lower portions of the stream.

Because the project will actually improve the flow and water quality of the stream and the evidence showing that the area downstream would be negatively impacted is tenuous, we find substantial evidence to support the ALC's conclusion that the functions and values in the vicinity of the project will not be impaired.[8]

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section a rating of "poor," which indicated "that the functions and values within that [portion] of the stream are limited and impaired."

[7] Dr. Tufford also admitted that the project's proposed stormwater treatment would have a beneficial effect on the water quality, acknowledging that any time there is a rain event, the stream currently carries pollutants, including parking lot runoff, chemicals for fertilizers, and fecal coliform.

[8] We note as well that although the South Carolina Department of Natural Resources and the United States Fish and Wildlife Service initially requested the project be held in abeyance because of concerns about impacts to the stream, both agencies later submitted letters stating they had no objection to the project.

II. FEASIBLE ALTERNATIVES AND THE 404(B)(1) GUIDELINES

Murphy next challenges the ALC's determination that there were no feasible alternatives, both in terms of the evidence existing in the record and the burden of proof it applied.

A. Substantial Evidence

Murphy's first argument is that the unrebutted testimony of her professional engineer, who identified a series of alternative site designs, demonstrated that feasible alternatives were available and certification should have been denied.[9] We disagree.

Under Regulation 61-101, certification should be denied if "there is a feasible alternative to the activity which reduces adverse consequences on water quality and classified uses." 25A S.C. Code. Ann. Regs. 61-101.F.5(b). Initially, Murphy asserts that because Respondents did not provide rebuttal testimony to her expert, Steve Strickland, the ALC erred in not accepting his conclusions that feasible alternatives to the site design existed. However, Respondents were not required to reply directly to Strickland's testimony because Strickland was himself a rebuttal witness retained after the commencement of the trial to rebut testimony of the District's engineer. Although Respondents could have called another witness in counter-rebuttal, the failure to do so does not, as Murphy contends, amount to a concession that Strickland's designs offered feasible alternatives. Instead, Respondents may have concluded it was unnecessary to respond to Stickland's challenges.

[9] Murphy appears to misconstrue our standard of review, couching it in terms of whether substantial evidence supports *her* assertion. The question before us, however, is whether the ALC's finding that no feasible alternatives exist is supported by substantial evidence such that a reasonable person would reach the same conclusion as the ALC.

Given that the term "feasible alternative" is not defined within the regulations, the ALC concluded that "'feasible' is equivalent to 'practicableness,'"[10] a term utilized by the Corps of Engineers which means "available and capable of being done after taking into consideration cost, existing technology, and logistics in light of the overall project purpose." 40 C.F.R. § 230.10(a)(2). Applying the "practicableness" meaning to the facts, we find substantial evidence to support the ALC's conclusion that no "feasible alternatives" existed with less adverse results.

During the certification process, District 5 was required to evaluate and report on alternatives which would cause the least negative impact to the stream. This included considerations of moving the practice fields offsite, purchasing adjacent property, obtaining an encroachment onto Santee Cooper's right of way, and shifting the parking lots and access roads. The District eventually reduced its requested fill area to 727 feet from the 1,501 feet it originally requested. The District also had to comply with the Office of Student Facilities' requirement that student parking be visible to the administration, so there were only limited areas where the parking lots could be placed. Other options, such as purchasing adjacent property, were deemed too expensive. Furthermore, offsite options would result in a disjointed campus, which would not properly serve the overall purpose of the project and could be detrimental to the paramount concerns for student safety and security.

Although Strickland opined that there were several alternatives the District could employ, the ALC found problems with all of them. His proposals to move the parking lot off the stream involved the construction of an expensive pedestrian bridge and required a decrease in the number of much needed parking spaces. He also proposed the use of expensive alternatives such as wetlands or underground retention as opposed to detention pools to deal with stormwater management. Moreover, the ALC noted that Strickland had spent only 40-60 hours considering these alternative designs and had visited the site only once for two hours. The ALC also found that he had not had an opportunity to review the stormwater plans,

[10] This ruling has not been challenged.

drainage calculations, or the findings regarding the parking needs of the District.

Given the careful study of alternatives by DHEC and the District, and the ALC's thorough consideration of Murphy's expert testimony, we find substantial evidence to support the ALC's conclusion that no feasible alternatives existed.

B. Burden of Proof

Murphy also argues that because the ALC relied on the 404(b)(1) Guidelines of 40 C.F.R. § 230 in concluding "as a matter of law, that the meaning of 'feasible' is equivalent to 'practicableness,'" the ALC should have also, in accordance with the Guidelines, presumed that practicable alternatives were available. We disagree.

Murphy rests this contention on the language of the regulation which states:

> Where the activity associated with a discharge which is proposed for a special aquatic site (as defined in subpart E) does not require access or proximity to or siting within the special aquatic site in question to fulfill its basic purpose (i.e., is not "water dependent"), practicable alternatives that do not involve special aquatic sites are presumed to be available, unless clearly demonstrated otherwise. In addition, where a discharge is proposed for a special aquatic site, all practicable alternatives to the proposed discharge which do not involve a discharge into a special aquatic site are presumed to have less adverse impact on the aquatic ecosystem, unless clearly demonstrated otherwise.

40 C.F.R. § 230.10(a)(3). Murphy contends that because the ALC borrowed the defined word "practicableness" to clarify the vague word "feasible," the ALC should also have adopted the entire analysis of practicable alternatives employed by the section 404(B)(1) Guidelines. She contends that because

the proposed project is not "water dependent" a presumption should arise against the District that less adverse alternatives exist and the ALC erred in shifting the burden to Murphy to demonstrate the availability of feasible alternatives.

We find Murphy's attempt to adopt the language of an entire regulation based on the ALC's use of a definition is misguided. The ALC used the definition of practicableness to clarify one of DHEC's statutes and aid in its evaluation of whether there were feasible alternatives under Regulation 61-101. The language Murphy attempts to import from the federal guidelines deals with whether the Corps of Engineers will issue a fill permit, which is a distinct consideration the Corps undertakes. The mere use of a definition for one word from the Guidelines does not require the ALC to structure its whole analysis on the language of that regulation.

Moreover, even assuming the District bore a burden to overcome the presumption that practicable alternatives exist, substantial evidence supports the conclusion that this burden was overcome. As discussed previously, the District engaged in extensive studies of alternatives and altered the original plan to reduce the impact to the stream when possible. Additionally, although the analysis of the Corps is not dispositive, because the Corps eventually issued the fill permit, it apparently concluded that the District had overcome these presumptions and established no practicable alternatives existed.

III. IMPROPER DELEGATION OF AUTHORITY

Finally, Murphy argues that DHEC improperly delegated its authority to grant the WQC to the District by accepting its assessment of need and the conclusions of its engineers. We disagree.

In determining whether to issue a WQC, DHEC is required to consider:

> (a) whether the activity is water dependent and the intended purpose of the activity;

(b) whether there are feasible alternatives to the activity;

(c) all potential water quality impacts of the project, both direct and indirect, over the life of the project including:

(1) impact on existing and classified water uses;

(2) physical, chemical, and biological impacts, including cumulative impacts;

(3) the effect on circulation patterns and water movement;

(4) the cumulative impacts of the proposed activity and reasonably foreseeable similar activities of the applicant and others.

25A S.C. Code Ann. Regs. 61-101.F.3.

In its staff assessment, DHEC addressed these concerns in some detail, and the supporting documents within the record provide a more in-depth review. Although DHEC may have relied on the information submitted by the District's experts, it certainly was at liberty so to do. The mere fact that DHEC agreed with the findings of the District does not indicate it allowed its authority to be supplanted. Furthermore, contrary to Murphy's assertions, DHEC did not merely accept the information submitted by the District without question. The record contains several communications between the District and DHEC in which DHEC repeatedly requests more information on certain issues, especially whether there are alternatives to the project and why such alternatives are not feasible. The record also shows that the District changed its original plan after these communications, eventually reducing the area of stream it sought to fill. It did so in part by eliminating a practice field and reducing the amount of student parking below its level of need. Thus, DHEC did not improperly delegate its authority to the District, but instead appears to have been extensively involved in reducing the impact of the

project. It certainly did not merely adopt the conclusions of the District or its experts.

CONCLUSION

Accordingly, we affirm the ALC's order upholding DHEC's issuance of a WQC to District 5.

AFFIRMED.

TOAL, C.J., PLEICONES, BEATTY and KITTREDGE, JJ., concur.

THE STATE OF SOUTH CAROLINA
In The Supreme Court

Kristi Glenn McLeod f/k/a/
Kristi G. Starnes, Appellant,

v.

Robert Anthony Starnes, Respondent.

Appeal from Lexington County
Richard W. Chewning, III, Family Court Judge

Opinion No. 27100
Heard February 15, 2011 – Filed March 7, 2012

REVERSED AND REMANDED

Jean Perrin Derrick, of Lexington, for Appellant,

J. Mark Taylor, of Moore, Taylor & Thomas, of West Columbia and Katherine Carruth Goode, of Winnsboro, for Respondent.

JUSTICE HEARN: Less than two years ago, this Court decided *Webb v. Sowell*, 387 S.C. 328, 692 S.E.2d 543 (2010), which held that ordering a non-custodial parent to pay college expenses violates equal protection, thus overruling thirty years of precedent flowing from *Risinger v. Risinger*, 273 S.C. 36, 253 S.E.2d 652 (1979). We granted permission in this

case to argue against precedent pursuant to Rule 217, SCACR, so that we could revisit our holding in *Webb*. Today, we hold that *Webb* was wrongly decided and remand this matter for reconsideration in light of the law as it existed prior to *Webb*.

FACTUAL/PROCEDURAL BACKGROUND

Kristi McLeod (Mother) and Robert Starnes (Father) divorced in 1993 following five years of marriage. Mother received custody of their two minor children, and Father was required to pay child support in the amount of $212 per week, which was later reduced to $175 per week by agreement, in addition to thirty-five percent of his annual bonus. At the time, Father earned approximately $29,000 per year plus a $2,500 bonus. However, his salary steadily increased to over $120,000 per year and his bonus to nearly $30,000 by 2007. In 2008, his salary was almost $250,000. During the same time period, Mother's income increased and fluctuated from less than $12,000 per year to a peak of approximately $40,000 per year. Despite the rather sizable increases in Father's income, Mother never sought modification of his child support obligation because, as Father admitted, she had no way of knowing about them.

In August 2006, the parties' older child, Collin, reached the age of majority and enrolled as a student at Newberry College.[1] To help take advantage of this opportunity, he sought all scholarships, loans, and grants that he could. Father wholly supported Collin's decision to attend Newberry. Indeed, Father wrote an e-mail in March 2006 agreeing to repay all of Collin's student loans upon graduation. He even co-signed a promissory note for Collin's student loans. Furthermore, in an August 2006 letter, Father agreed to pick up "odd expenses from [Collin]'s education" and told Collin to call him whenever he "needs a little help." Interestingly, Father took it upon himself in that same letter to unilaterally decrease his weekly child support from $175 to $100. Mother later acquiesced in this reduction, apparently in consideration of Father's assurances that he would support Collin while he

[1] Their younger son, Jamie, has autism; although he attained the age of majority in 2008, he is not expected to graduate from high school until he is twenty-one.

was in college. However, Father did not uphold his end of the bargain, nor did he regularly pay the percentage of his bonus as required.

Mother brought the instant action in March 2007 seeking an award of college expenses, an increase in child support for Jamie, and attorney's fees and costs. Father counterclaimed, asking that the court terminate: (1) his child support for Collin because he had attained the age of majority and graduated from high school; (2) his support for Jamie upon graduation from high school; (3) and the requirement that he pay a percentage of his annual bonus as child support. He also denied that he should be required to pay any college expenses for Collin. A temporary order was filed in June 2007 that set child support for Jamie at $235 per week, ordered Father to contribute $400 per month towards Collin's college expenses, and left intact the thirty-five percent of Father's annual bonus payable as support.

The final hearing was not conducted until March and July 2009. The court dismissed Mother's claim for college expenses on the ground that it violated the Equal Protection Clause of the United States Constitution.[2] Furthermore, the court found that Jamie's mental and physical disabilities required a continuation of child support beyond the age of majority and as long as the child's disabilities exist. However, the court reduced Father's obligation for Jamie after recalculating the base obligation using different figures than those used in the temporary order. Furthermore, the court reduced the percentage payable from his annual bonus from thirty-five to ten.[3] The court accordingly found Father had overpaid child support for the two years the temporary order was in effect and reduced his monthly payments by fifteen percent until the overpayment was discharged. Finally, the court required both parties to pay their own attorney's fees and costs.

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[2] *Webb* had not yet been decided at this time.

[3] The temporary order required Father to pay $1,018.33 per month, based upon Mother's monthly income of $1,600 and Father's monthly income of $8,741. The final order, however, required Father to pay $923 per month, finding Mother earned $3,300 per month and Father earned $10,666 per month.

ISSUES PRESENTED

Mother raises three issues on appeal:

I. Did the family court err in not awarding college expenses?

II. Did the family court err in lowering the current support for the younger child and awarding Father a credit for alleged overpayment of child support during the pendency of this case?

III. Did the family court err in not awarding Mother attorney's fees and costs?

LAW/ANALYSIS

I. COLLEGE EXPENSES

Mother argues the family court erred in finding that an order requiring Father to pay college expenses for Collin violates equal protection. We agree.

In *Webb*, we held that requiring a parent to contribute toward an adult child's college expenses violated the Equal Protection Clause.[4] 387 S.C. at 332-33, 692 S.E.2d at 545. We are not unmindful of the imprimatur of correctness which stare decisis lends to that decision. However, stare decisis is not an inexorable command: "There is no virtue in sinning against light or persisting in palpable error, for nothing is settled until it is settled right. . . . There should be no blind adherence to a precedent which, if it is wrong, should be corrected at the first practical moment." *Smith v. Daniel Const.*

[4] In particular, *Webb* held *Risinger*'s interpretation of Section 14-21-810(b)(4) of the South Carolina Code (1976)—now codified at Section 63-3-530(A)(17) (Supp. 2010)—violated equal protection. 387 S.C. at 333, 692 S.E.2d at 545.

Co., 253 S.C. 248, 255-56, 169 S.E.2d 767, 771 (1969) (Bussey, J., dissenting) (quoting *Sidney Spitzer & Co. v. Comm'rs of Franklin County*, 123 S.E. 636, 638 (N.C. 1924)). Furthermore,

> [w]hen the court is asked to follow the line marked out by a single precedent case it is not at liberty to place its decision on the rule of stare decisis alone, without regard to the grounds on which the antecedent case was adjudicated. . . . An original case could not possibly gain authority by a mere perfunctory following on the principle of stare decisis.

State v. Williams, 13 S.C. 546, 554-55 (1880). In that vein, stare decisis is far more a respect for a body of decisions as opposed to a single case standing alone. *See Langley v. Boyter*, 284 S.C. 162, 180, 325 S.E.2d 550, 560 (Ct. App. 1984), *quashed on other grounds*, 286 S.C. 85, 332 S.E.2d 100 (1985) ("The doctrine of stare decisis says that where a principle of law has become settled by a *series of court decisions*, it should be followed in similar cases." (emphasis added)). This is not to say that a single case garners no protection from stare decisis, for even in those circumstances we should hesitate to revisit and reverse our decisions without good cause to do so. Our precedents simply make clear, however, that such a case is not rendered immutable by stare decisis.

Therefore, "[s]tare decisis should be used to foster stability and certainty in the law, but[] not to perpetuate error." *Fitzer v. Greater Greenville S.C. Young Men's Christian Ass'n*, 277 S.C. 1, 4, 282 S.E.2d 230, 231 (1981), *superseded by statute on other grounds*, S.C. Code Ann. § 33-55-200, *et seq.* (2006). Stare decisis applies with full force with respect to questions of statutory interpretation because the legislature is free to correct us if we misinterpret its words. *Layton v. Flowers*, 243 S.C. 421, 424, 134 S.E.2d 247, 248 (1964). However, the doctrine is at its weakest with respect to constitutional questions because only the courts or a constitutional amendment can remedy any mistakes made. *Agostini v. Felton*, 521 U.S. 203, 236 (1997).

We are at the first practical moment to reexamine *Webb*, a "single precedent case" concerning a constitutional question because it is the first and

only case in this State finding an equal protection violation in these circumstances. We now believe *Webb* reversed the burden imposed on parties operating under rational basis review for equal protection challenges and should therefore be overruled.

In *Webb*, we were asked to determine whether requiring a non-custodial parent to pay college expenses was a violation of equal protection. 387 S.C. at 330, 692 S.E.2d at 544. "The *sine qua non* of an equal protection claim is a showing that similarly situated persons received disparate treatment." *Grant v. S.C. Coastal Council*, 319 S.C. 348, 354, 461 S.E.2d 388, 391 (1995). Absent an allegation that the classification resulting in different treatment is suspect, a classification will survive an equal protection challenge so long as it rests on some rational basis. *Lee v. S.C. Dep't of Natural Res.*, 339 S.C. 463, 467, 530 S.E.2d 112, 114 (2000). Under the rational basis test, a classification is presumed reasonable and will remain valid unless and until the party challenging it proves beyond a reasonable doubt that there "is no admissible hypothesis upon which it can be justified." *Carolina Amusement Co. v. Martin*, 236 S.C. 558, 576, 115 S.E.2d 273, 282 (1960). If we can discern any rational basis to support the classification, regardless of whether that basis was the original motivation for it, the classification will withstand constitutional scrutiny. *Lee*, 339 S.C. at 470 n.4, 530 S.E.2d at 115 n.4. The classification also does not need to completely achieve its purpose to withstand constitutional scrutiny. *Id.* at 467, 530 S.E.2d at 114.

In *Webb*, the majority viewed the classification created by *Risinger* for equal protection purposes as those parents subject to a child support order at the time the child is emancipated.[5] 387 S.C. at 332, 692 S.E.2d at 545.

[5] In their respective dissents in *Webb*, the Chief Justice and Justice Kittredge stated the majority should have reviewed that case under the classification raised by the parties themselves, which was divorced and non-divorced parents. *Webb*, 387 S.C. at 333-34, 692 S.E.2d at 546 (Toal, C.J., dissenting); *id.* at 336, 692 S.E.2d at 547 (Kittredge, J., dissenting). Although the majority in *Webb* undertook to remedy what it perceived to be a constitutional error on grounds other than those argued by the parties, *id.* at 332 n.5, 692 S.E.2d at 545 n.5, the mere fact that a constitutional question is involved does not permit the Court to address issues not properly before it, *cf.*

Without any elaboration, the majority concluded that there is no rational basis for treating parents subject to such an order different than those not subject to one with respect to the payment of college expenses. *Id.* Upon further reflection, we now believe that we abandoned our long-held rational basis rule that the party challenging a classification must prove there is no conceivable basis upon which it can rest and inverted the burden of proof. By not investigating whether there is any basis to support the alleged classification or refuting the bases argued, we effectively presumed *Risinger*'s reading of what is now section 63-3-530(A)(17) unconstitutional. Our treatment of this issue thus essentially reviewed *Risinger* under the lens of strict scrutiny as opposed to rational basis. *See Stephenson v. Bartlett*, 562 S.E.2d 377, 393 (N.C. 2002) ("Under strict scrutiny, a challenged governmental action is unconstitutional if *the State* cannot establish that it is narrowly tailored to advance a compelling government interest" (emphasis added)); *see also Qutb v. Strauss*, 11 F.3d 488, 492 (5th Cir. 1993) ("Under the strict scrutiny standard, we accord the classification no presumption of constitutionality."). Our decision in *Webb* therefore rests on unsound constitutional principles, and stare decisis does not preclude our reconsideration of the issue addressed in that case.[6]

As with any equal protection challenge, we begin by addressing the class *Risinger* created under section 63-3-530(A)(17). Mother argues that the appropriate classification is divorced parents versus non-divorced parents. In his brief, Father adheres to the class *Webb* analyzed of parents subject to a child support order at the time of emancipation versus those who are not subject to one. However, Father argued Mother's proposed classification before the family court. He therefore cannot argue *Webb*'s class on appeal. *See State v. Dunbar*, 356 S.C. 138, 142, 587 S.E.2d 691, 694 (2003) ("A

In re McCracken, 346 S.C. 87, 92, 551 S.E.2d 235, 238 (2001) ("A constitutional claim must be raised and ruled upon to be preserved for appellate review."). The dissent today would do the same thing as the *Webb* majority and review *Risinger* under a classification not properly before us.

[6] We are not unmindful of Mother's alternate argument that Father separately agreed to pay for Collin's college expenses. Although we are cognizant of our hesitancy to reach constitutional questions when it is not necessary, there is no cogent reason to let the error in *Webb* persist.

party may not argue one ground at trial and an alternate ground on appeal."). We accordingly review *Risinger* through the same lens used by the family court: whether it improperly treats divorced parents differently than non-divorced parents.

This State has a strong interest in the outcome of disputes where the welfare of our young citizens is at stake. As can hardly be contested, the State also has a strong interest in ensuring that our youth are educated such that they can become more productive members of our society. It is entirely possible "that most parents who remain married to each other support their children through college years. On the other hand, even well-intentioned parents, when deprived of the custody of their children, sometimes react by refusing to support them as they would if the family unit had been preserved." *In re Marriage of Vrban*, 293 N.W.2d 198, 202 (Iowa 1980). Therefore, it may very well be that *Risinger* sought to alleviate this harm by "minimiz[ing] any economic and educational disadvantages to children of divorced parents." *Kujawinski v. Kujawinski*, 376 N.E.2d 1382, 1390 (Ill. 1978); *see also LeClair v. LeClair*, 624 A.2d 1350, 1357 (N.H. 1993), *superseded by statute on other grounds* ("The legitimate State interest served by these statutes is to ensure that children of divorced families are not deprived of educational opportunities solely because their families are no longer intact."). There is no absolute right to a college education, and section 63-3-530(A)(17), as interpreted by *Risinger* and its progeny, does not impose a moral obligation on all divorced parents with children. Instead, the factors identified by *Risinger* and expounded upon in later cases seek to identify those children whose parents would *otherwise* have paid for their college education, but for the divorce, and provide them with that benefit.

We accordingly hold that requiring a parent to pay, as an incident of child support, for post-secondary education under the appropriate and limited circumstances outlined by *Risinger* is rationally related to the State's interest. While it is certainly true that not all married couples send their children to college, that does not detract from the State's interest in having college-educated citizens and attempting to alleviate the potential disadvantages placed upon children of divorced parents. Although the decision to send a child to college may be a personal one, it is not one we wish to foreclose to a child simply because his parents are divorced. It is of no moment that not

every married parent sends his children to college or that not every divorced parent refuses to do so. The tenants of rational basis review under equal protection do not require such exacting precision in the decision to create a classification and its effect.

Indeed, Father's refusal to contribute towards Collin's college expenses under the facts of this case proves the very ill which *Risinger* attempted to alleviate, for Father articulated no defensible reason for his refusal other than the shield erected by *Webb*. What other reason could there be for a father with more than adequate means and a son who truly desires to attend college to skirt the obligation the father almost certainly would have assumed had he not divorced the child's mother? Had Father and Mother remained married, we believe Father undoubtedly would have contributed towards Collin's education. Collin has therefore fallen victim to the precise harm that prompted the courts in *LeClair*, *Kujawinski*, and *Vrban*—as well as *Risinger*—to hold that a non-custodial parent could be ordered to contribute towards a child's college education. Thus, this case amply demonstrates what we failed to recognize in *Webb*: sometimes the acrimony of marital litigation impacts a parent's normal sense of obligation towards his or her children. While this is a harsh and unfortunate reality, it is a reality nonetheless that *Risinger* sought to address.

The dissent distinguishes *LeClair*, *Kujawinski*, and *Vrban* on the ground they interpret statutes which explicitly provide for an award of college expenses, contending section 63-3-530(A)(17) does not. As this case comes to us, however, *Risinger*'s reading of section 63-3-530(A)(17) has not been challenged on statutory construction grounds. Accordingly, for our purposes, section 63-3-530(A)(17) does permit the family court to award college expenses. The question before us today is only whether doing so violates equal protection.

The dissent accordingly must couch its attempt to undermine *Risinger* as one of subject matter jurisdiction which we can reach *sua sponte*. The subject matter jurisdiction of the family court is limited to what is "expressly or by necessary implication conferred by statute." *State v. Graham*, 340 S.C. 352, 355, 532 S.E.2d 262, 263 (2000). Over thirty years ago, *Risinger* held the predecessor to section 63-3-530(A)(17) permits a family court to award

college expenses if certain criteria are met.[7] Since *Risinger*, the statutes conferring jurisdiction on the family court have been amended repeatedly, yet the General Assembly never limited *Risinger*'s application. "The Legislature is presumed to be aware of this Court's interpretation of its statutes." *Wigfall v. Tideland Utils., Inc.*, 354 S.C. 100, 111, 580 S.E.2d 100, 105 (2003). When the General Assembly failed to amend this section over the course of three decades, "its inaction is evidence [it] agrees with this Court's interpretation." *See id.* At this juncture, we are therefore unwilling to agree with the dissent's *sua sponte* conclusion that the General Assembly never intended to give the family court jurisdiction to order the payment of college tuition as an incident of child support. Due to the General Assembly's tacit approval of *Risinger* for over thirty years and the fact its construction has never been challenged, not even in this case, reaffirming this principle does not amount to "legislat[ing] from the bench" or a "cavalier[] disregard of the Legislature's express limitations on the family court's jurisdiction" as the dissent suggests. If the dissent's assessment of legislative intent were correct, we are confident the General Assembly would have amended the jurisdictional statutes accordingly since 1979.

We now hold *Risinger* does not violate the Equal Protection Clause because there is a rational basis to support any disparate treatment *Risinger* and its progeny created. In fact, the case before us particularly demonstrates the need for a rule permitting an award of college expenses in certain circumstances in order to ensure children of divorce have the benefit of the college education they would have received had their parents remained together. Accordingly, we reverse the order of the family court and remand this matter for a determination of whether and in what amount Father is

[7] *Risinger* held the family court's authority to award support for a child after the age of majority '"where there are physical or mental disabilities of the child *or other exceptional circumstances that warrant it*'" included awarding college expenses. 273 S.C. at 38, 252 S.E.2d at 653 (quoting S.C. Code Ann. § 14-21-810(b)(4) (1979) (emphasis added)). We wrote that "[t]he need for education is the most likely additional 'exceptional circumstance' which might justify continued financial support." *Id.*

required to contribute to Collin's college education under the law as it existed prior to *Webb*.[8]

II. OVERPAYMENT OF SUPPORT

Mother argues the family court erred in awarding Father a credit for an alleged overpayment in child support from the date this action was filed. We agree.

The family court has the discretion to award retroactive child support from the filing date of the action upon a proper showing of a change in the child's needs or the supporting parent's ability to pay. *Ables v. Gladden*, 378 S.C. 558, 567-68, 664 S.E.2d 442, 447 (2008) (quoting *Thornton v. Thornton*, 328 S.C. 96, 115, 492 S.E.2d 86, 96 (1997); *Henderson v. Henderson*, 298 S.C. 190, 196, 379 S.E.2d 125, 129 (1989)). An increase or decrease may be ordered upon a showing of a change of condition at the time the modification is ordered. *Herring v. Herring*, 286 S.C. 447, 453, 335 S.E.2d 366, 369 (1985).

The temporary order set Father's monthly child support obligation at $1,018.33, based upon Mother's monthly pay of $1,600 and Father's monthly pay of $8,741. The order also left intact Father's obligation to pay Mother thirty-five percent of his annual bonuses. However, the final order decreased Father's obligation to $923, based upon Mother's monthly income of $3,300 and Father's monthly income of $10,666, and inexplicably reduced the percentage of Father's annual bonus payable as support from thirty-five percent to ten percent. The court also terminated Father's obligation to pay $400 per month towards Collin's college education. Based upon these new figures, the court found Father had overpaid support during the pendency of

[8] The family court also dismissed Mother's claim because Collin chose to attend a private college. While we agree that the cost of a child's education is a relevant consideration in light of the factors identified in *Risinger* and subsequent cases, attendance at a private school does not foreclose an award of expenses. Instead, the tuition amount is to be factored in with the child's attainment of scholarships, grants, and loans as well as the parents' ability to pay when determining whether to make such an award and in what amount.

the case. Retroactively applying both figures to the monies already paid from the filing of this action, the court found that Father had overpaid $2,669.24 in monthly support and $9,998.05 in annual support, and that Father could reduce his future monthly payments by fifteen percent until the overpayment was discharged. This was error.

We find the final monthly support order was based upon erroneous calculations of the parties' income. Further, the bonus payment reduction from thirty-five percent to ten percent was ordered without any stated explanation. We find the calculations contained in the temporary order correct and reinstate those monthly and annual support terms. Accordingly, Father has made no overpayment of support during the pendency of this action.

III. ATTORNEY'S FEES AND COSTS

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

"In determining whether to award attorney's fees, the court should consider each party's ability to pay his or her own fee; the beneficial results obtained by the attorney; the parties' respective financial conditions; and the effect of the fee on each party's standard of living." *Patel v. Patel*, 359 S.C. 515, 533, 599 S.E.2d 114, 123 (2004). Mother's attorney's fees and costs in this case are at least half of her income, while Father's are far less than one-third of his income. Further, this litigation was necessary primarily because of Father's conduct. Not only had Father neglected to pay the full amount of the thirty-five percent of his annual bonus due to his children, it was his contention that Jamie was not in need of support beyond the age of majority that prompted Mother to file this action, from which she has received significant beneficial results. Therefore, we reverse and remand for an award of attorney's fees and costs to Mother.

CONCLUSION

We therefore overrule *Webb* and find that *Risinger* and its progeny do not violate the principles of equal protection. Accordingly, we reverse the

family court's decision in this case and remand for a determination of what amount, if any, Father should pay towards Collin's college expenses. Additionally, we hold the family court erred in reducing Father's child support obligation for Jamie below the amount in the temporary order and in not awarding Mother attorney's fees and costs.

TOAL, C.J. and KITTREDGE, J., concur. BEATTY, J., dissenting in part in a separate opinion in which PLEICONES, J., concurs.

JUSTICE BEATTY: I respectfully dissent in part. Unlike the majority, I do not believe a family court has jurisdiction to order a parent to pay college tuition as an incident of child support. Accordingly, I would hold that a parent has no legal obligation to pay college expenses for a child who has reached the age of majority.

In my view, our decision in this case should not be based on an assessment of the equal protection challenge. Instead, I believe we must *sua sponte* address the more fundamental issue of whether the family court has jurisdiction to order a parent to pay college tuition as an incident of continuing child support. See Travelscape, L.L.C. v. S.C. Dep't of Revenue, 391 S.C. 89, 109 n.10, 705 S.E.2d 28, 38 n.10 (2011) (recognizing that this Court may *sua sponte* address an issue involving subject matter jurisdiction); Amisub of S.C., Inc. v. Passmore, 316 S.C. 112, 114, 447 S.E.2d 207, 208 (1994) (stating that the appellate court must always take notice of the lack of subject matter jurisdiction).

In my opinion, a review of the decision in Risinger reveals that it effectively expands the jurisdiction of the family court beyond what the Legislature has authorized. Furthermore, I believe the holding in Risinger violates the well-established tenets of our rules of statutory construction.

Central to my analysis of this case is a detailed review of section 63-3-530 of the South Carolina Code, which identifies forty-six areas over which the family court has exclusive jurisdiction. S.C. Code Ann. § 63-3-530 (2010) (previously codified at sections 14-21-810 and 20-7-420). Subsection 14 grants the family court jurisdiction to order child support. Id. § 63-3-530(A)(14) ("The family court has exclusive jurisdiction to order support of a . . . child."). Our Legislature has defined a child as "a person under the age of eighteen." Id. § 63-1-40(1) (formerly codified at section 20-7-30). In view of these inextricably linked code sections, I believe the Legislature clearly established the general rule that a parent's payment of child support terminates once a child has reached the age of eighteen.

Section 63-3-530(A)(17), however, provides an exception to this general rule, stating that the family court has exclusive jurisdiction:

> To make all orders for support run until further order of the court, except that orders for child support run until the child is eighteen years of age or until the child is married or becomes self-supporting, as determined by the court, whichever occurs first; or without further order, past the age of eighteen years if the child is enrolled and still attending high school, not to exceed high school graduation or the end of the school year after the child reaches nineteen years of age, whichever is later; or in accordance with a preexisting agreement or order to provide for child support past the age of eighteen years; or in the discretion of the court, to provide for child support past age eighteen where there are physical or mental disabilities of the child or other exceptional circumstances that warrant the continuation of child support beyond age eighteen for as long as the physical or mental disabilities or exceptional circumstances continue.

Id. § 63-3-530(A)(17) (previously codified at section 14-21-810(b)(4)) (emphasis added).

This section is silent with respect to a parent's payment of college expenses for a child who has reached the age of majority. Instead, the above-emphasized language, which explicitly deals with a child's education, clearly expresses the legislative intent that a family court may only order a parent to pay child support until a child's high school graduation or until the end of a school year after the child reaches nineteen years of age. Had the Legislature intended for a parent to pay college expenses as an incident of continuing child support, I believe it would have specifically included the phrase "college graduation." Because the Legislature has not authorized the family court to order such support, we must give effect to this legislative intent and conclude that the family court lacks jurisdiction to order a parent to pay college tuition as an incident of child support. See Mid-State Auto Auction of Lexington, Inc. v. Altman, 324 S.C. 65, 69, 476 S.E.2d 690, 692 (1996) (recognizing that the primary rule of statutory construction is to ascertain and give effect to the intent of the Legislature).

Moreover, the Legislature explicitly limited the jurisdiction of the family court over matters concerning a child's post-majority financial situation. Pursuant to subsection 17, the family court may order payment of child support past the age of eighteen where: (1) the child has a physical or mental disability; or (2) "exceptional circumstances" are present. Id. § 63-3-530(A)(17).

By its very terms, the "age of majority" implies that a person has become self-sufficient and is responsible for his or her own financial endeavors. See S.C. Const. art. XVII, § 14 ("Every citizen who is eighteen years of age or older, not laboring under disabilities prescribed in this Constitution or otherwise established by law shall be deemed sui juris and endowed with full legal rights and responsibilities . . . ." (emphasis added)); see also Style v. Shaub, 955 A.2d 403, 408 (Pa. Super. Ct. 2008) (defining the "age of majority" as "either eighteen years of age or when the child graduates from high school, whichever comes later"); 27C C.J.S. Divorce § 1106 (Supp. 2010) (stating that "as an exception to the general rule that the obligation of a divorced parent to provide child support terminates upon the child reaching majority, a financially able divorced parent may be required to support an adult child who, by reason of physical or mental disability, is unable to support himself or herself").

Contrary to these clear restrictions on a child's right to receive financial support beyond the age of majority, the Court in Risinger classified a college education as an "exceptional circumstance." In my view, this assessment was erroneous and should not serve as authority for the majority's decision to legally obligate a parent to pay for a child's post-majority college education.

Initially, as previously indicated, this language is outside the parameters of the educational provisions of section 63-3-530(A)(17). Furthermore, taken to its logical extreme, there would be no "cut-off" date for this legal obligation as any child of divorce, including "adult" children, would be entitled to financial support from a parent. I do not believe this is what the Legislature intended by promulgating section 14-21-810(b)(4).

Notably, none of the cases that have cited Risinger in the past thirty years have involved a statutory or constitutional analysis of section 14-21-

810(b)(4). Thus, I do not believe the majority can blindly adhere to Risinger and its progeny to justify its holding. Because the Legislature has not authorized the family court to order such support or created a statutory obligation for a divorced parent to pay for an adult child's post-secondary education, I would overrule Risinger and, in turn, affirm our decision in Webb.

Based on my conclusion regarding the family court's lack of jurisdiction, I do not believe it is necessary to address the constitutional implications of section 63-3-530(A)(17). Additionally, I would note that Father had previously agreed to pay a portion of Collin's college expenses. Thus, the resolution of the instant case is not dependent upon a review of Webb. Accordingly, I would decline to revisit that opinion and to address the equal protection issue. See In re McCracken, 346 S.C. 87, 92, 551 S.E.2d 235, 238 (2001) ("[I]t is this Court's firm policy to decline to rule on constitutional issues unless such a ruling is required."). However, given the majority's decision to rule on these issues, I must express my disagreement with the majority's analysis.

The equal protection clauses of our federal and state constitutions declare that no person shall be denied the equal protection of the laws. U.S. Const. amend. XIV, § 1; S.C. Const. art. I, § 3. Equal protection "requires that all persons be treated alike under like circumstances and conditions, both in the privileges conferred and in the liabilities imposed." GTE Sprint Commc'ns Corp. v. Pub. Serv. Comm'n of S. C., 288 S.C. 174, 181, 341 S.E.2d 126, 129 (1986) (quoting Marley v. Kirby, 271 S.C. 122, 123-24, 245 S.E.2d 604, 605 (1978)). "Courts generally analyze equal protection challenges under one of three standards: (1) rational basis; (2) intermediate scrutiny; or, (3) strict scrutiny." Denene, Inc. v. City of Charleston, 359 S.C. 85, 91, 596 S.E.2d 917, 920 (2004). "If the classification does not implicate a suspect class or abridge a fundamental right, the rational basis test is used." Id. "Under the rational basis test, the requirements of equal protection are satisfied when: (1) the classification bears a reasonable relation to the legislative purpose sought to be affected; (2) the members of the class are treated alike under similar circumstances and conditions; and, (3) the classification rests on some reasonable basis." Id.

In view of the above-outlined law, it is arguable that this case should be analyzed under the strict scrutiny test as the reduction of a parent's income clearly impinges upon a fundamental property right. See Wingfield v. S.C. Tax Comm'n, 147 S.C. 116, 152, 144 S.E. 846, 858 (1928) ("The court appreciates the earnest plea that every person is entitled to the enjoyment of life, liberty, and property, and to the equal protection of the laws guaranteed by the federal and state Constitutions, and will protect and safeguard these fundamental rights to the extent, if necessary, of declaring invalid any legislative enactment clearly shown to be in violation of them."). I cannot conceive of any plausible argument that could withstand this heightened level of scrutiny. Moreover, as will be discussed, I believe there is an equal protection violation even under the rational basis test, the lowest level of scrutiny.

For several reasons, I disagree with the majority's conclusion that requiring a parent to pay, as an incident of child support, for post-secondary education is rationally related to the State's interest in ensuring the education of our state's youth.

Initially, I would note that the out-of-state cases relied upon by the majority are distinguishable in that underlying those decisions is a statute that specifically provides for the payment of college expenses beyond the age of majority.[9] In contrast, section 63-3-530(A)(17) is silent with respect to the

[9] See Kujawinski v. Kujawinski, 376 N.E.2d 1382, 1390 (Ill. 1978) (analyzing section 513 of the 1977 Illinois Revised Statutes, which states in relevant part, "The Court also may make such provision for the education and maintenance of the child or children, whether of minor or majority age, out of the property of either or both of its parents as equity may require, whether application is made therefor before or after such child has, or children have, attained majority age."); In re Marriage of Vbran, 293 N.W.2d 198, 201-02 (Iowa 1980) (interpreting section 598.1(2) of the 1977 Iowa Code which provides that "child support" may include support "for a child who is between the ages of eighteen and twenty-two years who is regularly attending an approved school . . . , or is, in good faith, a full-time student in a college, university, or area school; or has been accepted for admission to a college . . ."); LeClair v. LeClair, 624 A.2d 1350, 1357 (N.H. 1993) (interpreting

payment of college expenses. Despite the lack of this provision, the Court in Risinger interpolated into the statute a legal obligation for a parent. In my opinion, this was in error as a parent's only financial responsibility for a child's college expenses emanates from a moral obligation.

In reaching its decision, the majority seizes upon this moral obligation. A moral obligation, however, cannot substantiate the imposition of a legal obligation. Although I am cognizant of the deleterious financial and emotional effects of divorce, these alone do not justify disparate treatment of children of divorced families and children of intact families. The children are similarly situated in that they are over the age of eighteen and desire parental financial support for college education. See Grant v. S.C. Coastal Council, 319 S.C. 348, 354, 461 S.E.2d 388, 391 (1995) ("The *sine qua non* of an equal protection claim is a showing that similarly situated persons received disparate treatment."). In analyzing this distinction, the question becomes whether section 63-3-530(A)(17), as interpreted in Risinger, creates a legal duty that is confined to situations of separated, divorced, or unmarried parents and their children. Thus, I disagree with the majority's class designation because I believe the class created by section 63-3-530(A)(17) is composed of separated, divorced, or unmarried parents and their children versus the parents and children of intact families. In my opinion, the State does not have a legitimate interest in treating separated, divorced, or unmarried parents and their children differently than their intact counterparts.[10]

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sections 458:17 and 458:20 of the New Hampshire Revised Statutes that specifically provide for a divorced parent's payment of reasonable college expenses for an adult child), superseded by, N.H. Rev. Stat. Ann. § 461 (2005) (enactment of "Parental Rights and Responsibilities Act").

[10] Furthermore, I would note that the majority defines the class as "divorced versus non-divorced parents," and distinguishes the class designation in Webb as "parents subject to a child support order at the time of emancipation versus those who are not subject to one." In my view, this distinction is inconsequential given the rarity of a divorce decree involving children that does not include a child support provision and the existence of a child support order involving an intact family. Thus, I believe the majority's class designation is the same as the one espoused in Webb.

In reaching this conclusion, I am persuaded by the factually-similar case of Curtis v. Kline, 666 A.2d 265, 270 (Pa. 1995), wherein the Pennsylvania Supreme Court refutes the majority's position that only children of divorce are entitled to post-majority financial support from their parents.

In Curtis, the court held that a statute requiring separated, divorced, or unmarried parents to provide post-secondary educational support to their adult child violated the Equal Protection Clause of the Fourteenth Amendment. Curtis, 666 A.2d at 270. In so holding, the court reasoned:

> Act 62 classifies young adults according to the marital status of their parents, establishing for one group an action to obtain a benefit enforceable by court order that is not available to the other group. The relevant category under consideration is children in need of funds for a post-secondary education. The Act divides these persons, similarly situated with respect to their need for assistance, into groups according to the marital status of their parents, i.e., children of divorced/separated/never-married parents and children of intact families.
>
> It will not do to argue that this classification is rationally related to the legitimate governmental purpose of obviating difficulties encountered by those in non-intact families who want parental financial assistance for post-secondary education, because such a statement of the governmental purpose assumes the validity of the classification. Recognizing that within the category of young adults in need of financial help to attend college there are some having a parent or parents unwilling to provide such help, the question remains whether the authority of the state may be selectively applied to empower only those from non-intact families to compel such help. We hold that it may not. In the absence of an entitlement on the part of any individual to post-secondary education, or a generally applicable requirement that parents assist their adult children in obtaining such an education, . . . we perceive no rational basis for the state government to provide only certain adult citizens with legal

> means to overcome the difficulties they encounter in pursuing that end.

Id. at 269-70; see Grapin v. Grapin, 450 So. 2d 853, 854 (Fla. 1984) (recognizing that the "societal ideal of continued parental support for the education and training" of adult children did not create a legal duty, and characterizing a family court's order to do so as an "indirect method of compelling unwilling divorced parents to provide college costs for their capable adult children").

In view of the foregoing, I believe that Risinger is a fallacy borne of noble purpose. Noble purpose, notwithstanding, this Court has no authority to legislate from the bench. Consequently, I would reverse the family court's order with respect to Father's payment of Collin's college expenses as I cannot cavalierly disregard the Legislature's express limitations on the family court's jurisdiction and the obvious equal protection deficiency of the Risinger decision.

PLEICONES, J., concurs.

THE STATE OF SOUTH CAROLINA
In The Supreme Court

In the Matter of William H. Jordan, Respondent.

Opinion No. 27101
Heard January 11, 2012 – Filed March 7, 2012

DEFINITE SUSPENSION

Lesley M. Coggiola, Disciplinary Counsel, and Barbara M. Seymour, both of Columbia, for Office of Disciplinary Counsel.

Gedney M. Howe, III, of Charleston, for Respondent.

PER CURIAM: Respondent received a nine-month suspension[1] in October 2009 following his successful completion of a pretrial intervention program for several drug-related charges[2] and dismissal of traffic charges.[3] In re

[1] Prior to his suspension, respondent had practiced law in the Charleston area for many years.

[2] Respondent had been charged with possession of cocaine with intent to distribute, possession within proximity of a school, possession of marijuana, and possession of drug paraphernalia.

Jordan, 385 S.C. 614, 686 S.E.2d 682 (2009). After he filed a petition for reinstatement but before that request was decided by this Court, additional disciplinary complaints relating to matters occurring before respondent's arrest were received. As a result, the petition for reinstatement was held in abeyance. Respondent admitted all the disciplinary charges made in the second complaint, and after an evidentiary hearing, a Panel of the Commission on Lawyer Conduct (Panel) recommended respondent be given an eighteen-month suspension, retroactive to his suspension on October 26, 2009, that two conditions be imposed upon his reinstatement to the practice of law, and that he be required to pay the costs of the proceeding.[4] Neither respondent nor the Office of Disciplinary Counsel (ODC) has objected to this recommended sanction.

This Court has the sole authority to discipline attorneys and to determine the appropriate sanctions after thoroughly reviewing the record. While we may make our own findings of fact and draw our own conclusions, the findings and conclusions of the Panel are entitled to much respect and consideration. In re Poff, 394 S.C. 37, 714 S.E.2d 313 (2011). After conducting our review, we agree with the Panel's findings of fact and with its recommended sanction.

FACTS

The Panel found respondent committed five acts of misconduct:

A. Trust Account Counter Withdrawals and Checks Written to Cash

Rule 417(b)(2), SCACR, requires that all withdrawals from an attorney's trust account be made either by a check payable to a named payee or by authorized bank transfer. Between February and April 2008, respondent withdrew $8,950.00 from his trust account by use of counter withdrawals and by checks made payable to cash. He took the funds

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[3] Following too closely, failure to surrender a driver's license, and driving under suspension.

[4] The costs total $1,328.47.

believing he was entitled to the money as undisbursed legal fees, but was unable to prove his entitlement because he did not keep proper records, in violation of Rule 1.15(a), Rules of Professional Conduct (RPC), Rule 407, SCACR, and Rule 417(a), SCACR. Respondent used the funds received for his own purposes, but replaced them with money taken from his operating account and from personal funds. For doing so, he was found to have violated Rules 1.15(a), 1.15(d), and 8.4(d), RPC.

B. Unidentified Disbursements from Trust Account by Checks Payable to Respondent

Between February 2006 and May 2008, respondent issued four checks payable to himself from his trust account without identifying any case or client on the check. The four checks totaled $5,650.00, and respondent restored this amount to his trust account. At the time these checks were written, respondent believed he had earned fees, but because of his failure to comply with the record-keeping requirements of Rule 1.15(a), RPC, and Rule 417, SCACR, he could not document this. By his conduct, respondent violated Rules 1.15(a), 1.15(d), and 8.4(d), RPC.

C. Client A Matter

Respondent conducted two real estate transactions on behalf of Client A. In each transaction, the HUD-1 settlement statement prepared by respondent was inaccurate. In one case, respondent disbursed $8,764.65 less than he received, and when respondent was suspended, this money was not in respondent's trust account, in violation of Rule 1.15(a) and (d), RCP. In the second case, a subaccount was underfunded by $8,808.89, again in violation of Rule 1.15(a) and (d), RCP.

Respondent has repaid Client A the $8,764.65 erroneously withheld from him. Respondent did not timely discover the errors as he was not reconciling his accounts as required by Rule 417(a)(8), SCACR.

D. Records/Reconciliation

Respondent's assistant oversaw respondent's accounts. He failed to review her reconciliations or otherwise supervise her activities in violation of Rule 5.3, RPC, and Rule 417, SCACR.

As a result of respondent's failure to oversee his assistant's work, the assistant was able to write checks drawn on respondent's trust account by forging his signature. She wrote eight checks to herself between May 2006 and March 2008. These checks totaled $16,704.67. During the period between January 2006 and January 2008, the assistant wrote twenty-nine checks payable to her personal creditors totaling $42,018.36. Respondent was made aware of the shortages in his trust account but not the reasons for them, and made deposits from his personal funds and operating account to make up the shortfalls.

E. Client B

Respondent borrowed $40,000 from Client B and although he repaid the money, he failed to comply with the disclosure and consent requirements of Rule 1.8(a), RPC.

SANCTION

The Panel recognized that disbarment was ordinarily the appropriate sanction for a lawyer who misappropriated client funds or whose failure to supervise staff resulted in their misappropriation of client funds. While it found the facts demonstrated a pattern of serious misconduct over a significant period of time thereby warranting a substantial sanction, it also found mitigating circumstances. First, respondent made a good faith effort to make restitution once the disciplinary investigation revealed the trust account issues, resulting in full restitution and no client losses. Second, respondent cooperated fully. Third, respondent presented significant and compelling

evidence in support of his good character and reputation from fellow Bar members.

The Panel also found that respondent's use of illegal drugs was a significant causative factor in his ethical misconduct, but that his "subsequent rehabilitation is so substantial and compelling that it should be considered in mitigation." We agree that respondent's actions following his arrest have been exemplary, demonstrating most especially a sincere and diligent effort to overcome the substance abuse issues which led to his misconduct.

Respondent was arrested on a Friday, sought counsel from an attorney known to the local Bar as an expert on substance abuse issues on Tuesday, began attending AA meetings on Saturday, and self-reported his arrest. He immediately entered an intensive rehabilitation program run by MUSC. Respondent went to 90 AA meetings in his first 90 days, completed the rehabilitation program, began counseling sessions with one of the MUSC therapists (which continue years later), and attended Wednesday night relapse prevention meetings. Respondent has worked on a golf course grounds crew during his suspension.

Respondent's AA sponsor and Robert Turnbull, director of the Lawyers Helping Lawyers Program, testified on respondent's behalf before the Panel. The sponsor testified to respondent's deep and abiding commitment to the tenets of AA. Mr. Turnbull praised respondent's efforts to maintain his sobriety, testifying the respondent was one of the few attorneys he has worked with who "gets it."

CONCLUSION

We find that respondent violated Rules 1.15(a), 1.15(d), 1.8(a), 5.3, and 8.4(d), RPC, and Rule 417, SCACR. Further, we find in light of respondent's most impressive mitigation showing that the appropriate sanction is an eighteen-month suspension, retroactive to October 26, 2009. In addition, he shall be responsible for the payment of costs. Upon reinstatement to the practice of law, he shall enter a two-year contract with Lawyers Helping

Lawyers and file quarterly reports with the Commission of Lawyer Conduct during the contract period, and for these first two years he shall also submit quarterly reports regarding all trust account activity to the Commission.

DEFINITE SUSPENSION.

TOAL, C.J., PLEICONES, BEATTY, KITTREDGE and HEARN, JJ., concur.

The Supreme Court of South Carolina

Re: Amendments to Rule 1.15, RPC,
Rule 407, South Carolina Appellate Court Rules

O R D E R

Pursuant to Article V, § 4, of the South Carolina Constitution, Rule 1.15, RPC, Rule 407, South Carolina Appellate Court Rules, is amended as set forth in the attachment to this order. The amendments are effective immediately.

s/ Jean H. Toal C.J.

s/ Costa M. Pleicones J.

s/ Donald W. Beatty J.

s/ John W. Kittredge J.

s/ Kaye G. Hearn J.

Columbia, South Carolina

March 1, 2012

Rule 1.15, RPC, Rule 407, SCACR, is amended by adding Paragraph (i) and Comments 12 and 13 to the Rule:

(i) Absent any obligation to retain a client's file which is imposed by law, court order, or rules of a tribunal, a lawyer shall securely store a client's file for a minimum of six (6) years after completion or termination of the representation unless:

(1) the lawyer delivers the file to the client or the client's designee; or

(2) the client authorizes destruction of the file in a writing signed by the client, and there are no pending or threatened legal proceedings known to the lawyer that relate to the matter.

If the client does not request the file within six (6) years after completion or termination of the representation, the file may be deemed abandoned by the client and may be destroyed unless there are pending or threatened legal proceedings known to the lawyer that relate to the matter. A lawyer who elects to destroy files shall do so in a manner which protects client confidentiality.

Comments:

[12] A lawyer who destroys a client file pursuant to Paragraph (i) must do so in a manner which protects client confidentiality, such as by shredding paper copies of the file. This rule does not affect the lawyer's obligation to return the client file and other client property upon demand in accordance with Rule 1.15 or the lawyer's obligations pursuant to Rule 1.16(d).

[13] A lawyer may not destroy a file under Paragraph (i) if the lawyer knows or has reason to know that there are legal proceedings pending or threatened that relate to the matter for which the lawyer created the files. Examples include post-conviction relief and professional liability actions against the

lawyer. Nothing in the rule prohibits a lawyer from converting files to an electronically stored format, provided the lawyer is capable of producing a paper version if necessary. Attorneys and firms should create file retention polices and clearly communicate those policies to clients.

The Supreme Court of South Carolina

In the Matter of Barton W. Fordham, Jr., Respondent.

ORDER

The Office of Disciplinary Counsel petitions the Court to transfer respondent to incapacity inactive status pursuant to Rule 17(b), RLDE, Rule 413, SCACR and seeks the appointment of an attorney to protect respondent's clients' interests pursuant to Rule 31, RLDE, Rule 413. Respondent consents to the transfer.

IT IS ORDERED that respondent is transferred to incapacity inactive status until further order of the Court.

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

account(s), operating account(s), and any other law office account(s) respondent may maintain that are necessary to effectuate this appointment.

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

Finally, this Order, when served on any office of the United States Postal Service, shall serve as notice that Richard C. Detwiler, Esquire, has been duly appointed by this Court and has the authority to receive respondent's mail and the authority to direct that respondent's mail be delivered to Mr. Detwiler's office.

This appointment shall be for a period of no longer than nine months unless request is made to this Court for an extension.

IT IS SO ORDERED.

s/ Jean H. Toal C.J.
FOR THE COURT

Columbia, South Carolina

February 27, 2012

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

Robert Crossland, Appellant,

v.

Shirley Crossland, Respondent.

Appeal From Richland County
George M. McFaddin, Jr., Family Court Judge

Opinion No. 4949
Heard December 14, 2011 – Filed March 7, 2012

AFFIRMED IN PART, REVERSED IN PART, AND REMANDED

Melvin D. Bannister, of Columbia, for Appellant.

Brian Dumas, of Columbia, for Respondent.

SHORT, J.: Robert Crossland (Husband) appeals the family court's order awarding Shirley Crossland (Wife) (1) periodic alimony in the amount of $958.50 per month, (2) forty percent of the marital estate, and (3) $16,024.50 in attorney's fees. On appeal, Husband argues the family court erred in awarding Wife alimony, forty percent of the marital estate, and attorney's fees. In addition, Husband argues the family court erred by substituting an amended order after it signed the original final order and

decree. We affirm in part, reverse in part, and remand for further proceedings consistent with this opinion.

FACTS

Husband and Wife were married in 1997 and separated for the final time on September 6, 2006. Husband filed the instant divorce action on August 17, 2007. At the time of the divorce hearing on March 1, 2010, Husband was seventy-six years old, and Wife was sixty-two years old. No children were born of the marriage, and both parties had been previously married.

Prior to his marriage, Husband had been employed with the United States Air Force, Hobart Manufacturing Company, and the State of South Carolina, but he had been retired for twenty years when he married Wife. His income prior to and during the marriage consisted of social security benefits, Air Force retirement benefits, and Veterans disability benefits. At the time the parties married, Husband owned two mobile homes, a house he purchased in 1955,[1] and savings in the form of stocks, savings accounts, certificates of deposits, and mutual funds. Shortly after the parties married, Husband added Wife to the accounts identified as his "savings"; however, after Wife left Husband the final time he transferred the money in the joint accounts to an annuity fund in his name only. At the time Wife left Husband, the parties estimated the savings accounts contained approximately $180,000, and documents submitted by Wife supported this valuation. At the time of the divorce hearing, Husband testified he had a gross income of $2,429 per month, and $149,000 in the annuity fund.

At the time the parties married, Wife had just returned from an extended mission trip and was not working. She claimed her employer was holding her previous position at a Christian bookstore, but Husband asked her to quit the job so they could travel together. Wife earned $5.00 per hour in her position at the bookstore and did not make enough to support herself. In

[1] Wife did not claim the marital estate included the mobile homes or residence.

addition, Wife owned no assets at the time of the marriage. She did not work during the marriage except for a brief period of employment with the Census Bureau and did not own any assets prior to the marriage. Wife testified she earned approximately $26,000 from her position with the Census Bureau. Wife also received $5,632.84 during the marriage in proceeds resulting from an automobile accident, which she deposited into one of the parties' joint accounts. She testified she was eligible for social security benefits but had not applied to begin receiving them.

Husband claimed Wife left their home on September 6, 2006, and did not return. He stated Wife had previously left him three times but eventually returned. He estimated they lived together for only five years of their ten-year marriage due to the various separations initiated by Wife. The final time Wife left, Husband claimed she took a 2000 Mercury Grand Marquis automobile with her, and he sent her title to the car upon her request. Wife testified she left because of Husband's erratic and overly controlling behavior, especially regarding finances.

Both parties suffered from various health problems. Husband suffered two knee replacements and surgeries for heart and prostate issues. Wife was diagnosed with breast cancer, which was successfully treated and continued to be in remission at the time of the divorce hearing. In addition, Wife suffered from back pain since 1989 and had surgery for a torn rotator cuff in 2006. Wife claimed she could not work at all because of fibromyalgia and back pain; however, she admitted she was employed prior to her marriage despite suffering from back and neck pain. She also testified she would lose her medical insurance as a result of the divorce and would need to procure new insurance at a cost of $330 per month.

After the final hearing, the family court granted Husband a divorce based on one year of continuous separation. In its final order, the family court awarded Wife forty percent of the marital estate, represented by the annuity fund in Husband's name and the amount of $20,442, which the family court found Husband had taken from the joint accounts to purchase an automobile after he filed for divorce. In addition, the family court found

Wife is unable to work due to her serious health problems and awarded her alimony in the amount of $958.50 per month. The family court also awarded Wife $16,024.50 in attorney's fees. This appeal followed.

STANDARD OF REVIEW

"In appeals from the family court, this [c]ourt reviews factual and legal issues de novo." Simmons v. Simmons, 392 S.C. 412, 414, 709 S.E.2d 666, 667 (2011). Accordingly, this court has the authority to find facts in accordance with its own view of the preponderance of the evidence. Lewis v. Lewis, 392 S.C. 381, 392, 709 S.E.2d 650, 655 (2011). However, "we recognize the superior position of the family court judge in making credibility determinations." Id. "Moreover, . . . an appellant is not relieved of his burden to demonstrate error in the family court's findings of fact." Id. "Consequently, the family court's factual findings will be affirmed unless appellant satisfies this court that the preponderance of the evidence is against the finding of the [family] court." Id. (internal citation and quotation marks omitted).

LAW/ANALYSIS

I. Alimony

Husband argues the family court erred in ordering him to pay Wife alimony in the amount of $958.50 per month. We agree.

"The purpose of alimony is to provide the ex-spouse a substitute for the support which was incident to the former marital relationship." Id. at 519, 675 S.E.2d at 823 (internal citation and quotation marks omitted). "Generally, alimony should place the supported spouse, as nearly as is practical, in the same position he or she enjoyed during the marriage." Id. (internal citation and quotation marks omitted). The family court must "make

an alimony award that is fit, equitable, and just if the claim is well founded." Id. (internal citation and quotation marks omitted).

"South Carolina law provides that the family court judge may grant alimony in such amounts and for such term as the judge considers appropriate under the circumstances." Davis v. Davis, 372 S.C. 64, 79, 641 S.E.2d 446, 454 (Ct. App. 2006). Section 20-3-130(C) of the South Carolina Code (Supp. 2011) sets forth the following factors for the family court to consider when awarding alimony:

> (1) the duration of the marriage . . . ; (2) the physical and emotional condition of each spouse; (3) the educational background of each spouse . . . ; (4) the employment history and earning potential of each spouse; (5) the standard of living established during the marriage; (6) the current and reasonably anticipated earnings of both spouses; (7) the current and reasonably anticipated expenses and needs of both spouses; (8) the marital and nonmarital properties of the parties . . . ; (9) custody of the children . . . ; (10) marital misconduct or fault of either or both parties . . . ; (11) the tax consequences to each party as a result of the particular form of support awarded; (12) the existence and extent of any support obligation from a prior marriage or for any other reason of either party; and (13) such other factors the court considers relevant.

In the instant case, Wife testified at the divorce hearing that she was eligible to receive social security benefits but had not applied for them. Because there is no evidence in the record the family court considered Wife's eligibility for social security benefits in its determination of alimony, we reverse the family court's alimony award and remand for a determination of Wife's income derived from social security benefits and a recalculation of alimony in light of such benefits and other income, imputed or otherwise.

See Marchant v. Marchant, 390 S.C. 1, 9, 699 S.E.2d 708, 713 (Ct. App. 2010) ("[I]t is proper to consider a supported spouse's earning capacity and impute income to a spouse who is underemployed or unemployed."); see also Smith v. Smith, 386 S.C. 251, 266, 687 S.E.2d 720, 728 (Ct. App. 2009) (noting that in deciding whether to award alimony, the family court must consider, inter alia, "the current and reasonably anticipated income of each spouse").

II. Equitable Distribution

Husband argues the family court erred in awarding Wife forty percent of the marital estate. Specifically, Husband contends the family court erred in (1) finding the annuity fund was transmuted into marital property, (2) valuing the annuity fund, and (3) failing to apply the relevant statutory factors in its determination of equitable distribution. Although we agree with the family court that the annuity fund was transmuted into marital property and with its valuation of the annuity fund, we agree with Husband that the family court erred in awarding Wife forty percent of the marital estate.

1. Transmutation of Annuity Fund

"Marital property includes all real and personal property the parties acquired during the marriage and owned as of the date of filing or commencement of marital litigation." King v. King, 384 S.C. 134, 143, 681 S.E.2d 609, 614 (Ct. App. 2009). Property acquired prior to the marriage can become marital property under the doctrine of transmutation. Johnson v. Johnson, 296 S.C. 289, 295, 372 S.E.2d 107, 110 (Ct. App. 1988). "Transmutation is a matter of intent to be gleaned from the facts of each case." Jenkins v. Jenkins, 345 S.C. 88, 98, 545 S.E.2d 531, 537 (Ct. App. 2001). "The spouse claiming transmutation must produce objective evidence showing that, during the marriage, the parties themselves regarded the property as the common property of the marriage." Johnson, 296 S.C. at 295, 372 S.E.2d at 110-11. "Such evidence may include placing the property in joint names, transferring the property to the other spouse as a gift, using the

property exclusively for marital purposes, commingling the property with marital property, using marital funds to build equity in the property, or exchanging the property for marital property." Id.

The evidence in the record supports the family court's finding that the annuity fund was marital property. Shortly after marrying Wife, Husband added Wife's name to the various accounts that made up what he referred to as his "savings." Husband transferred the funds from these accounts into the annuity fund in his name only after the parties separated for the final time. Husband testified he added Wife's name to the accounts after they married so she would have access to his savings in case anything happened to him. In addition, Wife testified she contributed what little income she had to the accounts and lived frugally pursuant to Husband's directives in order to preserve the funds in the accounts. Accordingly, the family court's finding on the issue of transmutation of the annuity fund was proper.

2. Valuation of Annuity Fund

The evidence in the record supports the family court's valuation of the annuity fund at $183,000. Although Husband testified at the divorce hearing that the value of the annuity fund was $149,000, he valued the fund at $183,000 on his financial declaration dated one week before the hearing and valued the fund at approximately $170,000 to $180,000 at the time he married Wife and at the time he filed the divorce action. Similarly, Wife valued the fund at $179,541 on her financial declaration, and documents submitted by Wife, including the couple's 2006 tax return, supported a value of approximately $180,000. Further, despite the family court's pre-trial order requiring Husband to obtain the value of his retirement accounts at the time of the marriage and as of the day of the commencement of the divorce action, Husband produced no records before or at trial documenting the value of such accounts. Accordingly, the family court did not err in valuing the annuity fund at $183,000.

3. Division of Marital Estate

"The doctrine of equitable distribution is based on a recognition that marriage is, among other things, an economic partnership." Morris v. Morris, 335 S.C. 525, 531, 517 S.E.2d 720, 723 (Ct. App. 1999) (internal citation and quotation marks omitted). "Upon dissolution of the marriage, marital property should be divided and distributed in a manner which fairly reflects each spouse's contribution to its acquisition, regardless of who holds legal title." Id. Section 20-3-620 of the South Carolina Code (Supp. 2011) provides the following fifteen factors for the family court to consider in apportioning marital property and affords the family court with the discretion to give weight to each of these factors "as it finds appropriate":

> (1) the duration of the marriage . . . [and] the ages of the parties at the time of the marriage and at the time of the divorce . . . ; (2) marital misconduct or fault of either or both parties . . . ; (3) the value of the marital property . . . ; (4) the income of each spouse, the earning potential of each spouse, and the opportunity for future acquisition of capital assets; (5) the health, both physical and emotional, of each spouse; (6) the need of each spouse or either spouse for additional training or education in order to achieve that spouses's income potential; (7) the nonmarital property of each spouse; (8) the existence or nonexistence of vested retirement benefits for each or either spouse; (9) whether separate maintenance or alimony has been awarded; (10) the desirability of awarding the family home . . . ; (11) the tax consequences to each or either party as a result of any particular form of equitable apportionment; (12) the existence and extent of any support obligations, from a prior marriage . . . ; (13) liens and any other encumbrances upon the marital property . . . ; (14) child custody arrangements and obligations . . . ; and

(15) such other relevant factors as the trial court shall expressly enumerate in its order.

"While there is certainly no recognized presumption in favor of a fifty-fifty division, we approve equal division as an appropriate starting point for a family court judge attempting to divide an estate of a long-term marriage." Doe, 370 S.C. at 214, 634 S.E.2d at 56. The purpose of the general fifty-fifty division is to protect the non-working spouse who undertook the household duties and prevent an award "solely based on the parties' direct financial contributions." Avery v. Avery, 370 S.C. 304, 311, 634 S.E.2d 668, 672 (Ct. App. 2006). However, this court has held that if a party can show special circumstances the family court can "tilt[] the equitable division scale in favor of one spouse." Id. at 312, 634 S.E.2d at 672.

Because the evidence in the record demonstrates Husband's disproportionately greater contributions to the marriage, we find the family court erred in awarding Wife forty percent of the marital estate. Wife brought no assets to the marriage and brought in no assets during the marriage. Similarly, she was not earning any income at the time of the parties' marriage and contributed only a negligible amount during the marriage to the parties' joint accounts from earnings from her temporary position with the Census Bureau and proceeds from an automobile accident. The vast majority of the contributions to the parties' accounts during the marriage were made from Husband's social security, retirement, and disability benefits. Similarly, the bulk of the funds in the accounts had been earned by Husband prior to the marriage and resulted from decades of living frugally and saving his earnings. In addition, although the parties were married for ten years before Husband filed for divorce, both parties acknowledge several periods of separation throughout the marriage. Finally, both parties were unemployed for the majority of the marriage and contributed to household duties. Under these circumstances, we find the family court erred in awarding Wife forty percent of the marital estate. Accordingly, we modify the order and award thirty percent of the marital estate to Wife and seventy percent to Husband.

III. Attorney's Fees

Husband argues the family court erred in ordering him to pay Wife's attorney's fees and costs in the amount of $16,024.50.

The family court may order one party to pay a reasonable amount to the other party for attorney's fees and costs incurred in maintaining an action for divorce pursuant to S.C. Code Ann. § 20-3-130(H) (Supp. 2011). "In determining whether an attorney's fee should be awarded, the following factors should be considered: (1) the party's ability to pay his/her own attorney's fee; (2) beneficial results obtained by the attorney; (3) the parties' respective financial conditions; and (4) effect of the attorney's fee on each party's standard of living." E.D.M. v. T.A.M., 307 S.C. 471, 476-77, 415 S.E.2d 812, 816 (1992). "[T]he six factors . . . in determining a reasonable attorney's fee [include]: (1) the nature, extent, and difficulty of the case; (2) the time necessarily devoted to the case; (3) professional standing of counsel; (4) contingency of compensation; (5) beneficial results obtained; [and] (6) customary legal fees for similar services." Glasscock v. Glasscock, 304 S.C. 158, 161, 403 S.E.2d 313, 315 (1991).

Because we reverse and modify, in part, the original order of the family court, we reverse the family court's award of attorney's fees to Wife and remand for redetermination in accordance with this opinion. See Sexton v. Sexton, 310 S.C. 501, 503-04, 427 S.E.2d 665, 666 (1993) (reversing and remanding attorney's fees issue for reconsideration when the substantive results achieved by counsel were reversed on appeal).

IV. Amended Order

Husband argues the family court erred by substituting an amended order for its original order after signing, but before filing, the original final order and decree. We disagree.

"Generally, a [family court] loses jurisdiction over a case when the time to file post-trial motions has elapsed." Russell v. Wachovia Bank, N.A., 370

S.C. 5, 20, 633 S.E.2d 722, 730 (2006). However, "[a]n order is not final until it is entered by the clerk of court; and until the order or judgment is entered by the clerk of court, the [court] retains control of the case." Upchurch v. Upchurch, 367 S.C. 16, 22, 624 S.E.2d 643, 646 (2006). Because the family court had not filed its original order, it retained jurisdiction to substitute an amended final order and decree and did not err in doing so.

CONCLUSION

In summary, the family court's determination that the annuity fund constituted marital property, and the valuation of the annuity fund are affirmed. Similarly, the family court did not err in substituting an amended order for its original final order and decree. However, we reverse the family court's division of the marital estate and find that seventy percent of the marital estate shall be awarded to Husband and thirty percent to Wife. In addition, the issues of alimony and attorney's fees are reversed and remanded for further proceedings consistent with this opinion.

AFFIRMED IN PART, REVERSED IN PART, AND REMANDED.

WILLIAMS and GEATHERS, JJ., concur.

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

Phillip Flexon, M.D., Respondent,

v.

PHC-Jasper, Inc., d/b/a Coastal Carolina Medical Center, Coastal Carolina Medical Center, Inc., Lifepoint Hospitals, Inc., and Tenet Healthsystems, Defendants,

Of whom, Coastal Carolina Medical Center, Inc. is, Appellant.

Appeal From Jasper County
Perry M. Buckner, Circuit Court Judge

Opinion No. 4950
Submitted January 3, 2012 – Filed March 7, 2012

AFFIRMED

James D. Myrick, John C. Hawk, & Dana W. Lang, all of Charleston, for Appellant.

William Harvey of Beaufort, for Respondent.

SHORT, J.: Coastal Carolina Medical Center, Inc. (Coastal) appeals the trial court's order denying its motion to compel arbitration in this breach of employment contract action filed by Phillip Flexon, M.D., against Coastal, PHC-Jasper, Inc., d/b/a Coastal Carolina Medical Center (PHC), Lifepoint Hospitals, Inc. (Lifepoint), and Tenet Healthsystems, Inc. (Tenet). We affirm.

FACTS

Flexon is a resident of Hardeeville, South Carolina, and is licensed to practice medicine as an ear, nose, and throat specialist in South Carolina and Georgia. Coastal is a South Carolina corporation with its principal place of business in Jasper County, and it is wholly owned by Tenet, a Delaware corporation. PHC is a South Carolina corporation doing business as Coastal Carolina Medical Center in Jasper County, and it is the wholly-owned subsidiary of Lifepoint, a Tennessee corporation.

On December 18, 2006, Flexon entered into the Physician Employment Agreement (the Agreement) with PHC. The Agreement provided that Flexon would practice for five years "at the medical practice office located at 1010 Medical Center Drive, Hardeeville, South Carolina . . . and such other practice sites in Beaufort and Jasper counties as may be reasonably designated by [PHC] from time to time . . . ." Flexon alleged he had to close an established practice in Savannah, Georgia, in order to accept employment with PHC. The Agreement further provided:

> 13.4 Governing Law and Venue: This Agreement shall be governed by, and construed and enforced in accordance with, the laws of the State of South Carolina. Any action or claim arising from, under or pursuant to this Agreement shall be brought in the courts, state or federal, within the State of South Carolina, and the parties expressly waive the right to bring any legal action or claims in any other courts. The parties hereto hereby (sic) consent to venue in any state or federal court within the State of South Carolina having jurisdiction over the County for all

> purposes in connection with any action or proceeding commenced between the parties hereto in connection with or arising from this Agreement.
>
> 13.5 Arbitration: Except as to the provisions contained in Articles VIII and IX [Disclosure of Information and Covenant Not to Compete], the exclusive jurisdiction of which shall rest with a court of competent jurisdiction in the state where the hospital is located any controversy or claim arising out of or related to this Agreement, or any breach thereof, shall be settled by arbitration in the County, in accordance with the rules and procedures of alternative dispute resolution and arbitration . . . , and judgment upon any award rendered may be entered in any court having jurisdiction thereof.

Flexon alleges that at the time of negotiating the Agreement, PHC was in negotiations to sell its assets, including the hospital, Coastal Carolina Medical Center, to Tenet. Upon Flexon's commencement of practice at Coastal Carolina Medical Center in March of 2007, PHC allegedly refused to honor commitments it made to Flexon regarding equipment purchases and the recruitment of an audiologist. In June 2007, Lifepoint sold PHC and Coastal Carolina Medical Center to Tenet.

In July 2007, Tenet presented Flexon with an Amendment to and Assignment of Physician Employment Agreement (the Amendment), which purported to assign the Agreement to Tenet. Flexon refused to sign the Amendment. In August 2008, he allegedly delivered a formal notice of termination for cause, pursuant to the Agreement. Flexon received a letter in May 2009 claiming he owed Tenet more than $725,000, and he must cease his practice of medicine in Savannah, Georgia. Flexon filed this action. Coastal filed a motion to compel arbitration. The trial court held a hearing on the motion. The parties stipulated that the arbitration provision in the Agreement failed to comply with the South Carolina Arbitration Act. Coastal argued the Federal Arbitration Act (FAA) governed, alleging the Agreement involved interstate commerce.

The trial court found the Agreement "calls for local medical services to be performed by a Hardeeville resident at a medical facility located in Hardeeville." Distinguishing Thornton v. Trident Medical Center, L.L.C., 357 S.C. 91, 592 S.E.2d 50 (Ct. App. 2003), and citing Arkansas Diagnostic Center, P.A. v. Tahiri, 257 S.W.3d 884 (Ark. 2007), the trial court denied the motion to compel arbitration, finding the Agreement did not involve interstate commerce, and the FAA did not apply. This appeal followed.

STANDARD OF REVIEW

The question of whether a claim is subject to arbitration is subject to de novo review. Partain v. Upstate Auto. Grp., 386 S.C. 488, 491, 689 S.E.2d 602, 603 (2010). However, the trial court's factual findings will not be reversed on appeal if there is any evidence reasonably supporting the findings. Id.

LAW/ANALYSIS

I. FAA

Coastal argues the trial court erred in finding the FAA did not apply to the Agreement. We disagree.

Here, the parties stipulated that the South Carolina Arbitration Act does not apply. Therefore, we must determine whether the FAA preempts the state requirements. See Zabinski v. Bright Acres Assocs., 346 S.C. 580, 590, 553 S.E.2d 110, 115 (2001) (stating the inquiry does not conclude with the application of the state act, and the court must determine if the federal act preempts state requirements).

The FAA provides in pertinent part: "A written provision in any . . . contract evidencing a transaction **involving commerce** to settle by arbitration a controversy thereafter arising out of such contract . . . shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract." 9 U.S.C. § 2 (2010) (emphasis added). Unless the parties have contracted otherwise, the FAA applies to any

arbitration agreement regarding a transaction that involves interstate commerce, despite the parties' contemplation of an interstate transaction. Munoz v. Green Tree Fin. Corp., 343 S.C. 531, 538-39, 542 S.E.2d 360, 363-64 (2001).

"The United States Supreme Court has held that the phrase 'involving commerce' is the same as 'affecting commerce,' which has been broadly interpreted to mean Congress intended to utilize its powers to regulate interstate commerce to its full extent." Blanton v. Stathos, 351 S.C. 534, 540, 570 S.E.2d 565, 568 (Ct. App. 2002) (citing Allied-Bruce Terminix Cos. v. Dobson, 513 U.S. 265 (1995)). "To ascertain whether a transaction involves commerce within the meaning of the FAA, the court must examine the agreement, the complaint, and the surrounding facts." Zabinski, 346 S.C. at 594, 553 S.E.2d at 117.

The trial court rejected Coastal's argument that the Agreement here, and its surrounding circumstances, involved interstate commerce under Thornton v. Trident Medical Center, L.L.C., 357 S.C. 91, 592 S.E.2d 50 (Ct. App. 2003). In Thornton, Trident was experiencing a shortage of cardiovascular physicians and began to recruit physicians, including Thornton, from other parts of the country to Charleston, South Carolina. Id. at 93, 592 S.E.2d at 50-51. The Agreement required Thornton to move his practice from Michigan to Charleston, provided financial incentives, and further provided for arbitration in the event of a dispute. Id. at 93, 592 S.E.2d at 51. The parties had a dispute, and Thornton filed a declaratory judgment action seeking a determination that the arbitration provision was unenforceable. Id. at 94, 592 S.E.2d at 51. This court disagreed, finding that because the Agreement affected interstate commerce, the FAA applied. Id. at 95-96, 592 S.E.2d at 52-53. The court relied heavily on the fact that Thornton relocated from Michigan, and the contract provided for him to be compensated for the expenses incurred in moving his personal effects to South Carolina. Id. at 97, 592 S.E.2d at 53.

The trial court distinguished Thornton and relied on the analysis in Arkansas Diagnostic Center, P.A. v. Tahiri, 257 S.W.3d 884, 892 (Ark. 2007), in which the Arkansas Supreme Court found there was no interstate commerce involved, and the FAA did not apply to the employment contract

at issue. The contract in Tahiri contained an arbitration provision, and the Arkansas Diagnostic Center (ADC) attempted to enforce the provision when Dr. Tahiri filed a complaint against ADC for numerous causes of action, including breach of the contract. Id. at 886-87. ADC argued interstate commerce was involved because there was "evidence to show that it treated out-of-state patients, received payments from out-of-state insurance carriers, purchased goods from out-of-state vendors, and paid for Dr. Tahiri to travel to seminars outside of Arkansas." Id. at 888. The Arkansas Supreme Court found these factors alone insufficient to compel arbitration under the FAA. Id. at 891-92. The court stated:

> [ADC] failed to demonstrate anything other than that it was a local clinic, with local physicians who had privileges at local hospitals, and treated local patients. . . .
>
> [I]t also failed to prove that Dr. Tahiri's employment facilitated its alleged interstate business activities. . . . Most specific to the employment contract at issue is that ADC was a *local* clinic, which contracted with Dr. Tahiri to provide medical services to its *local* patients. Based on these factors, we hold that Dr. Tahiri's employment agreement . . . did not evidence a transaction involving commerce. . . .
>
> Were this court to hold otherwise, it would equate to a finding that the FAA is applicable to any contract containing an arbitration clause, as it could be argued that every contract involves some nexus to interstate commerce . . . . Instead, the question is simply whether the *contract* evidences a *transaction* involving commerce.

Id. at 892 (emphasis in original).

We agree with the trial court that the facts of this case are more akin to those in Tahiri. Under the facts surrounding this agreement, Flexon was a South Carolina resident, and Coastal hired him to provide medical services "at the medical practice office located at 1010 Medical Center Drive, Hardeeville, South Carolina . . . and such other practice sites in Beaufort and Jasper counties as may be reasonably designated by [PHC] from time to time . . . ." We agree with the trial court's finding that the Agreement and surrounding facts did not implicate interstate commerce. Therefore, the FAA did not apply to the Agreement. See Thornton, 357 S.C. at 96, 592 S.E.2d at 52 ("Our courts consistently look to the essential character of the contract when applying the FAA.").

II. Employment v. Recruiting Agreements

Coastal also argues the trial court erred in distinguishing this case from Thornton v. Trident Medical Center, L.L.C., 357 S.C. 91, 592 S.E.2d 50 (Ct. App. 2003), based on the difference between a recruiting contract and an employment contract. We agree, but find no resulting prejudice.

In Thornton, this court cited Selma Medical Center, Inc. v. Fontenot, 824 So.2d 668 (Ala. 2001), and relied in part on the fact that the contract was a recruiting contract in determining it implicated interstate commerce. Thornton, 357 S.C. at 98-100, 592 S.E.2d at 53-54.[1] The Arkansas Supreme Court also relied on the difference between an employment contract and a recruiting contract in distinguishing Thornton and finding interstate commerce not implicated. Arkansas Diagnostic Center, P.A. v. Tahiri, 257 S.W.3d 884, 891 (Ark. 2007). The Court stated: "[w]e note that, here, it is only an employment agreement at issue, which obligates Dr. Tahiri to provide medical services, and not a recruitment agreement." Id. at 891 n.3.

[1] In Selma, the recruiting contracts involved two physicians moving their practices from South Carolina to Alabama. Selma, 824 So.2d at 669. The Alabama Supreme Court found the contracts "were themselves an integral part of the Physicians' movement in the flow of commerce, subjecting their personal-service contracts to the jurisdiction of the FAA." Id. at 675.

Here, the trial court also noted that Thornton involved a recruiting agreement, and the Agreement here "is clearly and expressly denominated an employment agreement, not a recruiting agreement." To the extent the trial court relied on this distinction, we find the trial court erred. The United States Supreme Court has expressly noted that "[e]mployment contracts, except for those covering workers engaged in transportation, are covered by the FAA." E.E.O.C. v. Waffle House, Inc., 534 U.S. 279, 289 (2002). The relevant inquiry is whether "the agreement, the complaint, and the surrounding facts" affect interstate commerce. Zabinski v. Bright Acres Assocs., 346 S.C. 580, 594, 553 S.E.2d 110, 117 (2001).

Despite this error, we find the trial court employed the appropriate analysis by reviewing the Agreement and the surrounding circumstances. Therefore, we find no prejudice resulting from the trial court's error in distinguishing between an employment agreement and a recruiting agreement. See State v. Patterson, 367 S.C. 219, 231, 625 S.E.2d 239, 245 (Ct. App. 2006) ("An error not shown to be prejudicial does not constitute grounds for reversal.").

CONCLUSION

For the foregoing reasons, the order on appeal is

AFFIRMED.

WILLIAMS and GEATHERS, JJ., concur.

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

Estate of Caroline B. Gill by J. Louis Grant and Thomas S. Baldwin, Co-personal Representatives, Appellant,

v.

Clemson University Foundation, Amy Nichol Castillo, Thomas Smith Baldwin, Shannon Whitehead, Jordan Whitehead, I.H. Gregorie, Beth Gregorie, and Morgan Stanley & Company, Incorporated, Respondents.

Appeal From Jasper County
Marvin H. Dukes, III, Special Referee

Opinion No. 4951
Head January 23, 2012 – Filed March 7, 2012

AFFIRMED

Dean Britton Bell, of Hilton Head Island, for Appellant.

John M. Jolley, of Hilton Head Island; and Robert L. Widener and Celeste T. Jones, of Columbia, for Respondents.

SHORT, J.: This dispute arises from the Last Will and Testament (the Will) of Caroline Gill and a bequest from Gill's Estate to Clemson University Foundation (Clemson) to establish and fund the Danny Lee Ford Endowed Scholarship Fund (the Scholarship). Gill's personal representatives, J. Louis Grant and Thomas Baldwin, on behalf of Gill's Estate (the Estate), appeal from the special referee's order finding the Danny Ford bequest was unambiguous; prohibiting the Estate from introducing extrinsic evidence; ordering the Estate to execute the bequest with estate funds; and determining the IRA in Gill's name was a non-testamentary asset that must be executed as set forth in the documents associated with the IRA and did not satisfy the Danny Ford bequest. The Estate argues the special referee erred in: (1) failing to consider extrinsic evidence of Gill's intent because the terms of the Will and IRA beneficiary designation, as they pertain to the establishment and funding of the Scholarship, were ambiguous; (2) prohibiting Grant's proffered testimony because it was relevant and should have been admitted as an exception to the hearsay rule pursuant to Rule 803(3), SCRE; (3) refusing to make a factual finding that Gill intended to make a single bequest of $100,000 to Clemson; (4) including factual findings in its order that were not supported by the record; (5) failing to find the written beneficiary designation in Gill's IRA Adoption Agreement Form (the Agreement) satisfied the contemporaneous writing requirement of S.C. Code Ann. § 62-2-610; and (6) not requiring all the funds paid to Clemson be held and administered in strict accordance with the terms of item II(e) of the Will. We affirm.

FACTS

Pursuant to item II(e) of the Will, Gill bequeathed $100,000 to Clemson to establish the Scholarship.[1] The Will specified that the Scholarship fund "shall be administered by the said legatee [Clemson] by using the income therefrom (but never any of the principal) to provide

[1] Gill executed the Will on May 27, 2004.

scholarships at [Clemson] for academically deserving football players." The Will further stated the money was "to be used to defray the expenses of tuition, books, activities, and related living expenses such as room and board." The Estate contends that to provide a funding mechanism for the Scholarship, Gill specifically designated the Scholarship as the beneficiary of $100,000 contained in an IRA account with Morgan Stanley.[2] The Agreement, implemented almost one year after Gill executed the Will, lists the designated primary beneficiaries as "Clemson University Foundation $100,000 Danny Ford Scholarship Fund" and "Caroline B. Gill Estate."[3] The Estate asserts the gift was structured that way to provide the most tax-efficient method to fund the new endowment created by the Will. Clemson maintains it is entitled to both the $100,000 from the Morgan Stanley IRA account and $100,000 from the Will. As such, Clemson requested and received from Morgan Stanley $100,000 from Gill's IRA.

The Estate filed an amended complaint in probate court on July 13, 2009, seeking a declaratory judgment and a temporary injunction, adding Morgan Stanley as a party. Clemson filed a motion for removal of the matter to circuit court, which the probate court granted. The matter was referred to a special referee by consent order. On November 18, 2009, the Estate filed a second amended complaint, removing the cause of action for a temporary injunction and Morgan Stanley as a party. A non-jury trial was held on November 30, 2009, and the special referee took the matter under advisement. The special referee issued his order on December 15, 2009, finding the Will was unambiguous, and therefore, no extrinsic evidence could be considered to determine Gill's intent. The referee further found the IRA was a non-testamentary asset that passed outside the Will. The Estate filed a motion to reconsider, which was denied. This appeal followed.

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[2] The Morgan Stanley retirement account contained $180,959.25 on February 28, 2009.

[3] Gill signed the Agreement on April 26, 2005, and she passed away on November 12, 2008.

STANDARD OF REVIEW

This case began as an action for declaratory relief in probate court. "Whether an action for declaratory relief is legal or equitable in nature depends on the plaintiff's main purpose in bringing the action." Williams v. Wilson, 349 S.C. 336, 340, 563 S.E.2d 320, 322 (2002). "An appellate court's determination of the standard of review for matters originating in the probate court is controlled by whether the cause of action is at law or in equity." Holcombe-Burdette v. Bank of Am., 371 S.C. 648, 654, 640 S.E.2d 480, 483 (Ct. App. 2006). This case involves the construction of a will, which is an action at law. Id. "In an action at law, on appeal of a case tried without a jury, the findings of fact of the judge will not be disturbed upon appeal unless found to be without evidence which reasonably supports the judge's findings." Townes Assocs., Ltd. v. City of Greenville, 266 S.C. 81, 86, 221 S.E.2d 773, 775 (1976).

LAW/ANALYSIS

I. Extrinsic Evidence

The Estate argues the special referee erred in failing to consider extrinsic evidence of Gill's intent because the terms of the Will and IRA beneficiary designation, as they pertain to the establishment and funding of the Scholarship, were ambiguous. We disagree.

"The paramount rule of will construction is to determine and give effect to the testator's intent." Holcombe-Burdette, 371 S.C. at 655, 640 S.E.2d at 483; see S.C. Code Ann. § 62-1-102(b)(2) (2009) ("The underlying purposes and policies of this Code are . . . (2) to discover and make effective the intent of a decedent in the distribution of his property."). "In construing the provisions of a will, every effort must be made to determine and carry out the intentions of the testator." Id. at 656, 640 S.E.2d at 483. "A will must be read in the ordinary and grammatical sense of the words employed, unless some obvious absurdity, repugnancy, or inconsistency with the declared

intention of the testator, as abstracted from the whole will, would follow from such construction." Kemp v. Rawlings, 358 S.C. 28, 34, 594 S.E.2d 845, 849 (2004). "The rules of construction are subservient to the primary consideration of ascertaining what the testator meant by the terms used in the written instrument itself, and each item of a will must be considered in relation to other portions." Id. If the terms or provisions of a will are ambiguous, the court may resort to extrinsic evidence to resolve the ambiguity. Bob Jones Univ. v. Strandell, 344 S.C. 224, 230, 543 S.E.2d 251, 254 (Ct. App. 2001). Two types of ambiguities are found in interpreting wills: patent and latent. The distinction between the two is that in patent ambiguity, "the uncertainty is one which arises upon the words of the . . . instrument as looked at in themselves, and before any attempt is made to apply them to the object which they describe." Id. (quoting In re Estate of Fabian, 326 S.C. 349, 353, 483 S.E.2d 474, 476 (Ct. App. 1997)). In latent ambiguity, "the uncertainty arises, not upon the words of the . . . instrument as looked at in themselves, but upon those words when applied to the object or subject which they describe." Id. A court may admit extrinsic evidence to determine whether a latent ambiguity exists, and if the court finds a latent ambiguity, extrinsic evidence is also permitted to help the court determine the testator's intent. In re Estate of Prioleau, 361 S.C. 627, 632, 606 S.E.2d 769, 772 (2004).

At trial, the Estate asserted the Scholarship did not exist prior to the Will, and that fact alone created an ambiguity that required the special referee to resort to extrinsic evidence. On appeal, the Estate asserts a latent ambiguity in the Will provided the special referee with the legal authority to look beyond the "four corners" of the Will to extrinsic evidence to ascertain Gill's intent. Specifically, the Estate argues "a latent ambiguity exists when considering the circumstances as a whole and the documents that were executed to carry out [Gill's] intent." Thus, the Estate asserts the special referee should have considered "both [the] Will and the [Agreement] as part of her overall plan and scheme and construe the two together to determine her intent." The extrinsic evidence offered by the Estate consisted of the Agreement and witnesses presented by the Estate. Grant testified he instructed Gill that if she designated a portion of her IRA to Clemson, she

would get a charitable deduction of $100,000 and not have to pay ordinary income taxes on the $100,000.[4] Linda Fraser, a financial advisor at Morgan Stanley, testified she went to Gill's home to meet with her, and Gill signed the Agreement. Fraser said she was not familiar with the terms of the Will, and Grant told her the Agreement was for estate planning reasons to establish the Scholarship. She further testified that nothing in the Will states the IRA account was to satisfy the bequest to Clemson. Thomas Baldwin, co-personal representative, testified Gill told him she was going to set up the Scholarship, but he did not know about the Agreement until after her death.

Clemson asserts that because the Estate did not make the latent ambiguity argument to the special referee, it is not preserved for our review. The Estate first raised the latent ambiguity argument in its memorandum in support of its motion to reconsider. Therefore, we find this issue is not preserved. See Wilder Corp. v. Wilke, 330 S.C. 71, 76, 497 S.E.2d 731, 733 (1998) ("It is axiomatic that an issue cannot be raised for the first time on appeal, but must have been raised to and ruled upon by the trial judge to be preserved for appellate review."); Kiawah Prop. Owners Grp. v. Pub. Serv. Comm'n of S.C., 359 S.C. 105, 113, 597 S.E.2d 145, 149 (2004) (finding the issue is not preserved because a party may not raise an issue in a motion to reconsider, alter, or amend a judgment that could have been presented prior to the judgment).

II. Testimony

The Estate argues the special referee erred in prohibiting Grant's proffered testimony because it was relevant and should have been admitted as an exception to the hearsay rule pursuant to Rule 803(3), SCRE. We disagree.

Rule 803(3) of the South Carolina Rules of Evidence provides that a statement of the declarant's then existing state of mind, emotion, sensation, or

[4] Grant was Gill's personal accountant and a family friend. Grant admitted that at the time he gave her this advice, he was not aware that an IRA's proceeds pass outside of a will and are not a part of the testamentary estate.

physical condition is not excluded by the hearsay rule. In full, the rule does not exclude:

> A statement of the declarant's then existing state of mind, emotion, sensation, or physical condition (such as intent, plan, motive, design, mental feeling, pain, and bodily health), but not including a statement of memory or belief to prove the fact remembered or believed unless it relates to the execution, revocation, identification, or terms of declarant's will.

Rule 803(3), SCRE. At trial, Clemson objected to parts of Grant's testimony as being hearsay and violative of the dead man's statute.[5] The Estate argued his testimony was admissible as an exception to the hearsay rule under Rule 803(3), SCRE. The court sustained Clemson's hearsay objection, and Grant proffered testimony that Gill told him she intended for the IRA designation to fulfill the Clemson bequest created in the Will. The Estate asserts Grant's testimony should have been admissible to show that "the IRA Beneficiary Designation was part of [Gill's] overall scheme and that the designation was part of the plan to fund the gift expressed in [the] Will" and the "testimony is relevant because it goes to [Gill's] intent."

However, Grant's testimony related to a statement made by Gill almost a year after she created the Will; therefore, her statement was not made at the time of the making of the Will to show her belief at that time, and the hearsay exception provided in Rule 803(3) does not apply to the testimony. Accordingly, we hold the special referee did not err in prohibiting Grant's proffered testimony because it was not admissible under Rule 803(3), SCRE, as an exception to the hearsay rule.

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[5] As to Clemson's objection based on the dead man's statute, the special referee allowed Grant's testimony, but reserved its objection.

III. Factual Findings

The Estate argues the special referee erred in refusing to make a factual finding that Gill intended to make a single bequest of $100,000 to Clemson. We disagree.

The Estate asserts the testimony confirms this fact and, even if the special referee found the extrinsic evidence was not admissible, he could have found it was Gill's intent to leave a single bequest of $100,000. We already determined the special referee was correct in finding the Will was unambiguous, giving Clemson a bequest of $100,000. Because the IRA account was a non-testamentary asset that passed outside the Will, it would have been error for the special referee to make a finding that Gill only intended to make a single bequest of $100,000. Section 62-6-106 of the South Carolina Code states that "[a]ny transfers resulting from the application of § 62-6-104 are effective by reason of the account contracts involved and this statute and are not to be considered as testamentary . . . ." S.C. Code Ann. § 62-6-106 (2009). Further, as Clemson asserts in its brief, the Estate did not challenge the special referee's finding that the IRA was a non-testamentary gift; therefore, this is law of the case. See Georgetown Cnty. League of Women Voters v. Smith Land Co., 393 S.C. 350, 357, 713 S.E.2d 287, 291 (2011) (holding an unappealed ruling, right or wrong, is the law of the case).

The Estate also argues the special referee erred in including factual findings in its order that were not supported by the record. We disagree.

Specifically, the Estate disagrees with the last paragraph on page five of the special referee's order. The part of that paragraph the Estate disagrees with reads:

> Decedent Gill was not an uneducated testatrix minimally counseled in estate law. A few years before her death, Decedent Gill dealt with the death

> and estate of her husband (also a supporter of all things Clemson University). In dealing with the estate of her late husband, Decedent Gill received counsel from two attorneys, using one of them to draft the Will sub judice. The Court takes note that the Estate decided not to present the testimony of either of these attorneys.

The Estate asserts there was no testimony concerning Gill's education or that she had anything to do with the planning of her late husband's estate or its administration. Further, the Estate asserts the testimony of Gill's attorneys concerning any matters pertaining to their representation of her would be subject to the attorney-client privilege, which survives death.

In its reply to the Estate's motion for reconsideration, Clemson stated it was "opposed to [the Estate's] request, but [did] not object to the [special referee] striking 'and supplemental findings of fact' from the last paragraph on page [five] of its Order." In its brief, Clemson asserts:

> Assuming all of [the Estate's arguments] to be true, and [they are] not, it has no effect on the appealed order. The trial court based its ruling on the law and the other facts in this case. [The Estate does] not suggest how any presumed errors affected the [special referee's] decision.

First, we find the factual findings were supported by the record. Grant testified Gill had a "huge" problem with the personal representatives of her husband's estate, and she had to petition the court to have them removed as the trustees. Grant also testified Gill had an attorney draft the Will and two other attorneys helped her remove the trustees from her husband's trust. These attorneys did not testify for the Estate.

Additionally, after making these findings of fact, the special referee wrote, "[i]t is upon this backdrop that the Court notes that the best indicator

of what a testator intends to occur after her passing, is found in her final expression. In the case of Decedent Gill, her final expression was found in the documents she signed." Thus, we agree with Clemson that the special referee based its ruling on the law and the other facts in the case, and the Estate does not suggest how any presumed factual errors affected the special referee's decision.

IV. S.C. Code Ann. § 62-2-610

The Estate argues the special referee erred in failing to find the written beneficiary designation in the Agreement satisfies the contemporaneous writing requirement of S.C. Code Ann. § 62-2-610. We disagree.

Section 62-2-610 of the South Carolina Code provides:

> Property which a testator gave in his lifetime to a person is treated as a satisfaction of a devise to that person in whole or in part, only if the will provides for deduction of the lifetime gift, or the testator declares in a contemporaneous writing that the gift is to be deducted from the devise or is in satisfaction of the devise, or the devisee acknowledges in writing that the gift is in satisfaction.

S.C. Code Ann. § 62-2-610 (2009). At trial, Clemson argued the Estate's claims were barred by this section. In its supplemental memorandum of law, the Estate argued in response that section 62-2-610 only contemplates lifetime gifts, and the IRA was not a gift during Gill's life because it did not pass until her death. In the alternative, the Estate asserted in its supplemental memorandum of law and motion for reconsideration that if the Agreement form was itself a lifetime gift, then it satisfied the contemporaneous writing requirement because it designated Clemson as the beneficiary. It also asserted Fraser's testimony regarding her meeting with Gill, and the fact that the Morgan Stanley check was restricted to Clemson for the benefit of the

Scholarship, when taken together with the Agreement, was sufficient to satisfy the statute's requirements.

Although Gill designated Clemson as a beneficiary on the IRA Agreement, the Will did not provide for the deduction of the money. Also, the Agreement did not state the IRA amount was to be deducted from the $100,000 devise or was in satisfaction of the devise. Further, Clemson did not acknowledge in writing that the IRA account was in satisfaction of the $100,000 devise. Therefore, we find the special referee correctly found the written beneficiary designation in the Agreement did not satisfy the contemporaneous writing requirement of section 62-2-610.

V. Administration of Funds

The Estate argues the special referee erred in not requiring all the funds paid to Clemson be held and administered in strict accordance with the terms of item II(e) of the Will. We disagree.

The Estate asserts that if the special referee determined Clemson is to receive $200,000 from Gill ($100,000 from the Will and $100,000 from the IRA), he should have required all the funds be held in strict accordance with the terms of the Will. The Will specified that the Scholarship fund "shall be administered by the said legatee [Clemson] by using the income therefrom (but never any of the principal) to provide scholarships at [Clemson] for academically deserving football players." The Will further stated the money was "to be used to defray the expenses of tuition, books, activities, and related living expenses such as room and board." In his order denying the Estate's motion to reconsider, the special referee ordered that the funds paid to Clemson from the Estate be held and administered in strict accordance with the terms of the Will. We find the special referee was correct that the $100,000 from the Will should be administered according to the Will's terms. Also, at trial, Clemson stated it was "perfectly happy to comport with the restrictive language set forth in the Will." However, because the IRA is a non-testamentary asset, it would have been error for the special referee to require the IRA funds to be administered according to the Will.

CONCLUSION

Accordingly, the special referee's order is

AFFIRMED.

WILLIAMS and GEATHERS, JJ., concur.