Judicial Merit Selection Commission

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March 7, 2003
M E D I A   R E L E A S E

Public Hearings have been scheduled to begin on **Tuesday, April 22, 2003,** commencing at **10:00 a.m.** regarding the qualifications of the following candidates for judicial positions:

COURT OF APPEALS:

Seat 3:
- The Honorable Mary E. Buchan, Marion, S.C.
- The Honorable John C. Hayes, III, Rock Hill, S.C.
- The Honorable John W. Kittredge, Greenville, S.C.
- The Honorable Alison R. Lee, Columbia, S.C.
- The Honorable Paul E. Short, Jr., Chester, S.C.

FAMILY COURT:

Third Judicial Circuit, Seat 2:
- Gordon B. Jenkinson, Esquire, Kingstree, S.C.
- W. Jeffrey Young, Esquire, Sumter, S.C.

RETIRED COURT OF APPEALS: The Honorable Jasper M. Cureton, Columbia, S.C.

RETIRED CIRCUIT COURT: The Honorable A. Victor Rawl, Charleston, S.C.

Persons desiring to testify at public hearings shall furnish written notarized statements of proposed testimony. These statements must be **received by 12:00 noon on Monday, April 14, 2003.** The Commission has witness affidavit forms that may be used for proposed testimony. While this form is not mandatory, it will be supplied on request. Statements should be mailed or delivered to the Judicial Merit Selection Commission as follows:

Michael N. Couick, 102 Gressette Building, Post Office Box 142, Columbia, South Carolina 29202.

All testimony, including documents furnished to the Commission, must be submitted under oath. Persons knowingly giving false information, either orally or in writing, shall be subject to penalty.

For further information about the Judicial Merit Selection Commission and the judicial screening process, you may access the website at www.scstatehouse.net/html-pages/judmerit.html.

Questions concerning the hearing and procedures should be directed to the Commission at (803) 212-6092.

* * *

The Supreme Court of South Carolina

RE: Lawyers Suspended by the Commission on Continuing Legal Education and Specialization

The Commission on Continuing Legal Education and Specialization has furnished the attached list of lawyers who have been administratively suspended from the practice of law pursuant to Rule 419(c), SCACR. This list is being published pursuant to Rule 419(d), SCACR. If these lawyers are not reinstated by the Commission by April 1, 2003, 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), SCACR.

Columbia, South Carolina
March 6, 2003

SUSPENSIONS
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The Supreme Court of South Carolina

RE: Lawyers Suspended by the South Carolina Bar

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(c), SCACR. This list is being published pursuant to Rule 419(d), SCACR. If these lawyers are not reinstated by the South Carolina Bar by April 1, 2003, 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), SCACR.

Columbia, South Carolina
March 6, 2003

LAWYERS SUSPENED BY THE SOUTH CAROLINA BAR FOR NON-PAYMENT OF 2003 LICENSE FEES AND ASSESSMENTS

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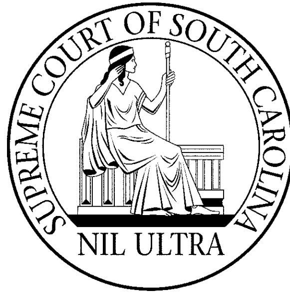

OPINIONS

OF

THE SUPREME COURT

AND

COURT OF APPEALS

OF

SOUTH CAROLINA

FILED DURING THE WEEK ENDING

March 10, 2003

ADVANCE SHEET NO. 9

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

South Carolina Farm Bureau Mutual Insurance Company, Petitioner,

v.

S.E.C.U.R.E. Underwriters Risk Retention Group, Ralph W. Garrison, Mary Garrison, Garrison Pest Control, Inc., Jack C. Purvis, Susan Purvis, and Jordan Purvis, a minor under the age of fourteen (14) years, Defendants,

of whom S.E.C.U.R.E. Underwriters Risk Retention Group is Respondent.

ON WRIT OF CERTIORARI TO THE COURT OF APPEALS

Appeal From Florence County
James E. Brogdon, Jr., Circuit Court Judge

Opinion No. 25602
Heard February 5, 2003 - Filed March 10, 2003

REVERSED

Louis D. Nettles, of Nettles, McBride, Hoffmeyer, P.A., of Florence, for petitioner.

Carlton Bruce Bagby, of Columbia, for respondent.

JUSTICE BURNETT: This is a declaratory judgment action concerning the priority of coverage for concurrent insurance policies issued by two insurance companies. The Court of Appeals held Petitioner South Carolina Farm Bureau Mutual Insurance Company's (Farm Bureau's) policy was primary and Respondent S.E.C.U.R.E. Underwriters Risk Retention Group's (SECURE's) insurance was excess. South Carolina Farm Bureau Mutual Ins. Co. v. S.E.C.U.R.E. Underwriters Risk Retention Group, 347 S.C. 333, 554 S.E.2d 870 (Ct. App. 2001). We reverse.

FACTS

Farm Bureau issued a homeowners liability policy to Ralph and Mary Garrison. SECURE issued a commercial general liability policy to the Garrisons' pest control business. The Garrisons' pet dog bit a child while on the premises of the pest control business. Both insurance companies denied coverage and asserted, if there was coverage, their coverage was secondary.

The Court of Appeals held both policies covered the occurrence. In addition, it applied the "total policy insuring intent" rule to conclude Farm Bureau's policy provided primary coverage while SECURE's coverage was excess. Id. We granted a writ of certiorari to review the application of the "total policy insuring intent" rule.[1]

---

[1] Although it argued in its brief that the two insurance policies did not provide concurrent coverage, SECURE did not petition the Court for a writ of certiorari on this issue. Accordingly, the Court of Appeals' decision that the polices provided concurrent coverage is the law of the case. State v. Barroso, 328 S.C. 268, 493 S.E.2d 854 (1997) (where party fails to challenge holding by Court of Appeals, ruling is law of the case).

ISSUE

Did the Court of Appeals properly apply the "total policy insuring intent" rule to determine Farm Bureau's policy was primary and SECURE's was excess?

DISCUSSION

Farm Bureau contends the Court of Appeals misapplied the "total policy insuring intent" rule established in South Carolina Ins. Co. v. Fidelity and Guar. Ins. Underwriters, Inc., 327 S.C. 207, 489 S.E.2d 200 (1997) (Fidelity), to conclude its policy provided primary coverage while SECURE's provided secondary coverage for the occurrence. Farm Bureau asserts because the policies' "other insurance" clauses provide Farm Bureau's coverage is excess while SECURE's is primary, the Court of Appeals erred by holding otherwise. We agree.

Farm Bureau's "other insurance" clause provides:

> **Other Insurance-Coverage E – Personal Liability.**
> This insurance is excess over other valid and collectible insurance except insurance written specifically to cover as excess over the limits of liability that apply in this policy.

SECURE's "other insurance" clause provides:

> If other valid and collectible insurance is available to the insured for a loss we cover under Coverages A or B of this Coverage Part, our obligations are limited as follows:
>
> a. Primary Insurance
>
> This insurance is primary except when b. below applies.

If this insurance is primary, our obligations are not affected unless any of the other insurance is also primary. Then, we will share with all that other insurance by the method described in c. below.

b. Excess Insurance

This insurance is excess over any of the other insurance, whether primary, excess, contingent or any other basis:

(1) That is Fire, Extended Coverage, Builder's Risk, Installation Risk or similar coverage for "your work";

(2) That is Fire Insurance for premises rented to you; or

(3) If the loss arises out of the maintenance or use of aircraft, "autos", or watercraft to the extent not subject to Exclusion g. of Coverage A (Section I).

When this insurance is excess, we will have no duty under Coverage A or B to defend any claim or "suit" that any other insurer has a duty to defend. If no other insurer defends, we will undertake to do so, but we will be entitled to the insured's rights against all those other insurers.

When this insurance is excess over other insurance, we will pay only our share of the amount of the loss, if any, that exceeds the sum of:

(1) The total amount that all such other insurance would pay for the loss in the absence of this insurance; and

(2) The total of all deductible and self-insured amounts under all that other insurance.

> We will share the remaining loss, if any, with any other insurance that is not described in this Excess Insurance provision and was not bought specifically to apply in excess of the Limits of Insurance shown in the Declarations and Coverage Part.

> c. Method of Sharing
>
> If all of the other insurance permits contribution by equal shares, we will follow this method also. Under this approach, each insurer contributes equal amounts until it has paid its applicable limit of insurance or none of the loss remains, whichever comes first. If any of the other insurance does not permit contribution by equal shares, we will contribute by limits. Under this method, each insurer's share is based on the ratio of its applicable limit of insurance to the total applicable limits of insurance of all insurers.

(Underline added).

In Fidelity, id., the Court was presented with the situation where two concurrent policies contained competing "excess" "other insurance" clauses (i.e., the language of both policies declared they were "excess" to other available coverage). The Court agreed that, "in many cases, 'excess' 'other insurance' clauses should cancel each other out, because two policies with such clauses cannot *both* be treated as 'excess' policies," but held the "total policy insuring intent" should "always remain the central issue in apportioning liabilities among multiple insurers." Id. S.C. at 215, S.E.2d at 204 (italic in original). Accordingly, the Court held "other insurance" clauses constitute only one factor among many others to consider in determining how to apportion liability.

In conclusion, the Court held:

> We find that in determining whether a loss covered by multiple insurers should be prorated, or whether one policy should be treated as an

'excess' policy, courts in South Carolina should consider the 'total policy insuring intent' based on all the language of the insurance policies at issue. If two policies both contain 'excess' clauses, but otherwise appear to provide for primary coverage, the excess clauses should be disregarded, and the concurrently covered loss prorated according to the policy limits of the respective policies.

Id. S.C. at 219, S.E.2d at 206 (underline added).

The Court of Appeals erred by applying the "total policy insuring intent" rule in this case. According to Fidelity, the "total policy insuring intent" rule applies when a court is required to determine liability among insurers when there are **competing** insurance clauses.[2]

Under the plain language of SECURE's "other insurance" clause, its insurance is primary. Under the plain language of Farm Bureau's "other insurance" clause, its insurance is "excess." Because these two provisions are not mutually repugnant, it was unnecessary to apply the "total policy insuring intent" rule to allocate priority between the two carriers.[3]

[2] The underlying facts, language of the opinion, and State Farm Fire & Cas. Co. v. LiMauro, 482 N.E.2d 13 (N.Y. 1985), discussed at length in the decision, support this conclusion. In LiMauro, the New York Court of Appeals was required to determine the priority of three automobile insurance policies. As noted in Fidelity, "[o]ne of the policies indisputably provided primary coverage, so the New York court only had to resolve whether the amount of the loss exceeding the limits of the primary policy should be prorated between the other two insurers, ..." Fidelity, S.C. at 216, S.E.2d at 204.

[3] In essence, the Court of Appeals applied the "total policy insuring intent" rule first to determine Farm Bureau's policy was primary, in spite of policy language to the contrary, and, consequently, in conflict with the primary nature of SECURE's policy. It again applied the "total policy insuring intent" rule to conclude Farm Bureau's policy was primary because it contained a clause specifically providing coverage for animal liability.

Accordingly, the Court of Appeals erred in applying the "total policy insuring intent" rule to hold Farm Bureau's policy was primary while SECURE's policy was secondary.

REVERSED.

TOAL, C.J., MOORE, PLEICONES, JJ., and Acting Justice J. Ernest Kinard, Jr., concur.

THE STATE OF SOUTH CAROLINA
In The Supreme Court

The Father, Petitioner,

v.

South Carolina Department of Social Services, Respondent.

ON WRIT OF CERTIORARI TO THE COURT OF APPEALS

Appeal From York County
Jamie Lee Murdock, Jr., Family Court Judge

Opinion No. 25603
Heard November 21, 2002 – Filed March 10, 2003

AFFIRMED

Debbie Sue Mollycheck; and Connie F. Payne, of Burnette & Payne, P.A., both of Rock Hill, for Petitioner.

Susan Lynn Anderson, of South Carolina Department of Social Services and W. Allen Nickles, III, of Gergel, Nickles & Solomon, P.A., both of Columbia, for Respondent.

Tony Miller Jones, of Elrod Jones Leader & Benson, of Rock Hill, for Guardian ad Litem.

JUSTICE PLEICONES: We granted certiorari to consider whether the Court of Appeals erred in reversing a family court order awarding petitioner (Father) $22,000 in attorney's fees under the South Carolina Frivolous Civil Proceedings Sanction Act (the FCPSA).[1] The Father v. South Carolina Dep't of Soc. Serv., 345 S.C. 57, 545 S.E.2d 523 (Ct. App. 2001). We affirm.

FACTS

Respondent Department of Social Services (DSS) determined a child abuse complaint against Father was "indicated." Father initiated an administrative appeal of this finding;[2] DSS responded by preparing to take the matter before the family court. Before DSS commenced any action, Father brought this action to have the "indicated" finding purged from DSS' records.

Following a series of hearings and orders, the family court ordered the "indicated" finding of abuse be changed to "unfounded" and awarded Father $22,000 in attorney's fees as a sanction pursuant to the FCPSA.[3] DSS appealed this award, and Father cross-appealed the denial of his request for sanctions under Rule 11, SCRCP.

The Court of Appeals held that while the family court could award sanctions under the FCPSA, the facts here did not warrant the $22,000 attorney's fee. The court reversed that award, and further held that Father was not entitled to any Rule 11 relief. The Father, *supra*. This Court granted Father's petition for a writ of certiorari. We now affirm.

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[1] S.C. Code Ann. §§ 15-36-10 to –50 (Supp. 2002).

[2] See S.C. Code Ann. § 20-7-655(A) (Supp. 2002).

[3] The Court of Appeals' opinion contains a complete explication of the facts.

ISSUES

1) Whether permitting an attorney's fee award under the FCPSA is inconsistent with this Court's decision in Spartanburg County Dep't of Soc. Serv. v. Little, 309 S.C. 122, 420 S.E.2d 499 (1992)?

2) What is the proper appellate standard of review under the FCPSA?

3) Whether the Court of Appeals erred when it concluded that the $22,000 award to Father was an abuse of discretion under its view of the evidence?

4) Whether Rule 11, SCRCP, sanctions should be considered in this case?

ANALYSIS

1. Did the Court of Appeals effectively overrule Little?

South Carolina Code Ann. § 15-77-300 (Supp. 2002) permits a court to tax attorney's fees against a state agency if it concludes "that the agency acted without substantial justification in pressing its claim…" §15-77-300(1). This Attorney's Fee Act specifically exempts certain types of suits from its ambit, including child abuse and neglect actions. After the Attorney's Fee Act became effective on July 1, 1985, the General Assembly amended the Family Court's general jurisdiction statute to provide "suit money including attorney's fees, may be assessed for or against a party to an action brought in or subject to the jurisdiction of the family court." S.C. Code Ann. § 20-7-420(38) (Supp. 2002). In Spartanburg County Dep't of Soc. Services v. Little, *supra*, this Court held that the Attorney's Fee Act in Title 15, specifically prohibiting an award of attorney's fees against DSS in a child abuse action even where DSS acted without substantial justification, prevailed over the general jurisdiction statute in Title 20.

DSS complains that the effect of the Court of Appeals' decision in this case, holding that attorney's fees and court costs may be assessed against DSS in a child abuse and neglect action under the FCPSA, effectively overrules Little. We disagree.

The Attorney's Fee Act bars an award of attorney's fees in a child abuse and neglect case even where DSS has acted without "substantial justification." § 15-77-300. On the other hand, in order to receive attorney's fees and/or court costs as a sanction under the FCPSA, the aggrieved party must show that the party sought to be sanctioned acted 'frivolously.' See, e.g., Hanahan v. Simpson, 326 S.C. 140, 485 S.E.2d 903 (1997) (denial of summary judgment precludes finding of frivolity, and thus no sanction may be imposed under the FCPSA). A party who makes a 'frivolous' claim or raises a 'frivolous' defense has committed a more egregious act than one who merely acts 'without substantial justification.' See Heath v. Aiken County, 302 S.C. 178, 394 S.E.2d 709 (1990) ("A court need not go so far as to brand a claim 'frivolous' in order for it to be found to be without substantial justification").

The General Assembly specifically exempted DSS from liability for attorney's fees when it acts without substantial justification in a child abuse and neglect action. § 15-77-300. When the legislature enacted the FCPSA, and authorized the award of sanctions in the form of attorney's fees and costs against any party, including governmental entities,[4] found to have pursued frivolous litigation, it included no such exception. We are required to interpret these statutes as written. By their plain terms, the statutes exempt DSS from the payment of attorney's fees where its pursuit of a child abuse and neglect action was merely without substantial justification, but do not exempt the agency from the possibility of sanctions in the form of attorney's fees and/or court costs where its actions rise to the level of frivolity. See, e.g., Hodges v. Rainey, 341 S.C. 79, 533 S.E.2d 578 (2000) (Court bound to give effect to legislature's intent as expressed in plain and unambiguous statutory language). It is not for this Court to second-guess the wisdom of these decisions made by the General Assembly. E.g., Keyserling v. Beasley, 322 S.C. 83, 86, 470 S.E.2d 100, 101 (1996).

[4] See § 15-36-10 (Supp. 2002).

We agree with the Court of Appeals that attorney's fees and/or court costs **may** be awarded against DSS in an abuse and neglect case pursuant to the FCPSA. Nothing in this decision undermines or conflicts with our decision in Little that attorney's fees are not awardable against DSS in a child abuse and neglect action pursuant to the Attorney's Fee Act.

2. What is the proper standard of appellate review of an award made pursuant to the FCPSA?

We granted Father permission to argue against precedent which holds that the decision whether to award sanctions under the FCPSA is a matter in equity, entitling the appellate court to take its own view of the preponderance of the evidence. Kilcawley v. Kilcawley, 312 S.C. 425, 440 S.E.2d 892 (Ct. App. 1994) *cited with approval in* Hanahan v. Simpson, *supra*. Father argues we should substitute an "abuse of discretion" standard. We adhere to precedent.

The decision to impose a sanction under the FCPSA is to "be determined by the trial judge at the conclusion of a trial…." S.C. Code Ann. § 15-36-30 (Supp. 2002). Since the decision whether to impose sanctions under the FCPSA is a decision for the judge, not the jury, it sounds in equity rather than at law. Cf. Flagstar Corp. v. Royal Surplus Lines, 341 S.C. 68, 533 S.E.2d 331 (2000) (noting right to trial by jury in law case). Pursuant to the South Carolina Constitution, an appellate court reviews findings of fact in an equity matter taking its own view of the evidence. S.C. Const. art. V, § 5; see also S.C. Code Ann. § 14-3-320 (Supp. 2002).

Father argues that the United States Supreme Court's decision in Cooter and Gell v. Hartmax Corp., 496 U.S. 384, 110 S.Ct. 2447, 110 L.Ed.2d 359 (1990), setting forth the federal appellate standard of reviewing a sanction award pursuant to Rule 11, FRCP, applies by analogy and requires this Court to alter our scope of review. We disagree.

> In Cooter and Gell, the Supreme Court explained:
>
> If the district court's account of the evidence is plausible in light of the record viewed in its entirety, the court of appeals may not reverse it even though convinced that had

> it been sitting as the trier of fact, it would have weighed the evidence differently. Where there are two permissible views of the evidence, the fact-finder's choice cannot be clearly erroneous….

The fact that the federal courts employ a more deferential standard of review is not mandated by the federal constitution, and thus our constitutional standard applies. So long as sanctions are decided by a judge and not a jury, the South Carolina Constitution mandates an appellate court take its own view of the facts. S.C. Const art. V, § 5.

The "abuse of discretion" standard urged by Father does, however, play a role in the appellate review of a sanctions award. An abuse of discretion occurs where the decision is controlled by an error of law or is based on unsupported factual conclusions. See, e.g., Zabinski v. Bright Acres Assoc., 346 S.C. 580, 553 S.E.2d 110 (2001) (emphasis supplied). For example, where the appellate court agrees with the trial court's findings of fact, it reviews the decision to award sanctions, as well as the terms of those sanctions, under an abuse of discretion standard. Cf., McDowell v. South Carolina Dep't of Soc. Serv., 304 S.C. 509, 405 S.E.2d 830 (1991) (in reviewing attorney's fee sanction imposed pursuant to S.C. Code Ann. § 15-77-300, appellate court looks to whether acts of party sanctioned had reasonable basis in law and fact).

We adhere to our constitutionally mandated scope of review.

3. Whether the Court of Appeals committed errors in setting aside the $22,000 sanction based on its view of the evidence?

We have reviewed the record in this matter, the family court's order, and the opinion of the Court of Appeals. We find that while DSS's conduct in this matter was flawed in some respects, Father did not meet his burden of proving that DSS acted without a proper purpose in this case. § 15-36-20. We agree with the Court of Appeals' view of the evidence, and therefore affirm the decision setting aside the FCPSA sanction.

4. Whether Rule 11, SCRCP, sanctions should be considered in this matter?

The Court of Appeals held that the "criteria for Rule 11 sanctions are essentially the same as those for sanctions under the [FCPSA] Act." The Father v. DSS, 345 S.C. at 72, 545 S.E.2d at 531. Accordingly, it held that since Father could not prevail under the FCPSA, the family court committed no error in failing to sanction DSS pursuant to the Rule.[5] Id. Father contends this was error. We disagree.

We agree with the Court of Appeals that the standard for sanctions under Rule 11 is essentially the same as that of the FCPSA. Compare Runyon v. Wright, 322 S.C. 15, 471 S.E.2d 160 (1996) (Rule 11 sanction for frivolous filing or argument, or for bad faith filing) with Pool v. Pool, 321 S.C. 84, 467 S.E.2d 753 (Ct. App. 1996), *aff'd as modified*, 329 S.C. 324, 494 S.E.2d 820 (1998) (standard for FCPSA sanction is frivolity). Accordingly, we affirm the Court of Appeals' holding that there is no basis to remand the case to the family court for consideration of Father's request for Rule 11 sanctions.

CONCLUSION

For the reasons given above, the decision of the Court of Appeals reversing the award of sanctions to Father is

AFFIRMED.

TOAL, C.J., WALLER, BURNETT, JJ., and Acting Justice Henry F. Floyd, concur.

[5] Thus, neither of these courts reached the issue of whether an award pursuant to the FCPSA and one pursuant to the Rule would constitute a "double sanction." We, likewise, do not reach that issue.

THE STATE OF SOUTH CAROLINA
In The Supreme Court

Joshua Davis, Petitioner,

v.

Orangeburg-Calhoun Law Enforcement Commission, Respondent.

ON WRIT OF CERTIORARI TO THE COURT OF APPEALS

Appeal From Orangeburg County
Donald W. Beatty, Circuit Court Judge

Opinion No. 25604
Heard March 4, 2003 – Filed March 10, 2003

DISMISSED AS IMPROVIDENTLY GRANTED

Benjamin Allen Dunn, of Dunn Dunn & Peeples and J. Lewis Cromer, of Cromer & Mabry, both of Columbia for Petitioner.

Kathryn Thomas and Derwood L. Aydlette, III, both of Gignilliat Savitz & Bettis, of Columbia for Respondent.

M. Brian Magargle and Melissa A. Inzerillo, both of Haynsworth Baldwin Johnson & Greaves, of Columbia for Amicus Curiae.

PER CURIAM: After full review of the Appendix and briefs, we dismiss the writ of certiorari as improvidently granted.

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

THE STATE OF SOUTH CAROLINA
In The Supreme Court

In the Matter of Richard E. Lester, Respondent.

Opinion No. 25605
Submitted February 11, 2003 - Filed March 10, 2003

PUBLIC REPRIMAND

Henry B. Richardson, Jr. and Michael S. Pauley, both of Columbia, for the Office of Disciplinary Counsel.

George M. Hearn, Jr., of Hearn, Brittain & Martin, P.A., of Conway; and Sally Wiggins Speth, of Columbia, for Respondent.

PER CURIAM: Respondent and Disciplinary Counsel have entered into an agreement pursuant to Rule 21, RLDE, Rule 413, SCACR, in which respondent admits misconduct and agrees to accept an admonition or a public reprimand. We accept the agreement and issue a public reprimand.

According to the facts stated in the agreement, respondent represented the purchaser in a real estate transaction. Respondent was out of town on the date of the closing.

Prior to leaving town, respondent caused to be prepared a HUD-1 settlement statement, as well as several other closing documents, which he personally reviewed. However, the HUD-1 statement was actually signed for him by a paralegal, who signed at respondent's direction and with his permission, on the date of the closing. The paralegal did not include a notation adjacent to respondent's signature indicating her authority to sign on his behalf.

The closing was conducted by the paralegal without respondent or another attorney present. Respondent maintains he remained accessible to the paralegal by telephone throughout the closing. He also maintains other attorneys in his law firm were available and could have responded to any inquiries that may have arisen at the closing.

Respondent admits that he has allowed other real estate transactions or closings to be conducted outside his presence and that the transactions and closings were conducted by non-lawyer personnel who were instructed to contact respondent by telephone if necessary. Respondent now recognizes that either he or another licensed attorney should have been physically present to conduct the actual real estate transactions and closings. Respondent states he has modified the methods employed in his law practice to institute such a policy.

As a result of his conduct, respondent has violated the following provisions of the Rules of Professional Conduct, Rule 407, SCACR: Rule 1.1 (a lawyer shall provide competent representation to a client); Rule 1.2(a) (a lawyer shall abide by a client's decisions concerning the objectives of representation and shall consult with the client as to the means by which they are to be pursued); Rule 5.3(a) (a partner in a law firm shall make reasonable efforts to ensure that the firm has in effect measures giving reasonable assurance that a non-lawyer assistant's conduct is compatible with the professional obligations of the lawyer); Rule 5.3(b) (a lawyer having direct supervisory authority over a non-lawyer assistant shall make reasonable efforts to ensure that the person's conduct is compatible with the professional obligations of the lawyer); Rule 5.5(b) (a lawyer shall not assist a person who is not a member of the bar in the performance of an activity that constitutes

the unauthorized practice of law); and Rule 8.4(a) (it is professional misconduct for a lawyer to violate or attempt to violate the Rules of Professional Conduct, knowingly assist or induce another to do so, or do so through the acts of others). By violating the Rules of Professional Conduct, respondent has also violated Rule 7(a)(1) of Rule 413, SCACR.

We agree with the finding of improper conduct and find that a public reprimand is the appropriate sanction. Accordingly, respondent is hereby reprimanded for the conduct detailed above.

We also take this opportunity to state that we view with alarm the growing tendency of attorneys to allow support staff to perform functions which should be performed by attorneys. We caution members of the Bar that this practice dilutes the attorney-client relationship and diminishes the attorney's ability to monitor all aspects of a case for which the attorney is ultimately responsible. We further direct the Bar's attention, once again, to In re Easler, 275 S.C. 400, 272 S.E.2d 32 (1980), in which this Court set forth guidelines with regard to the role of paralegals in assisting attorneys, and to State v. Buyer's Service Co., Inc., 292 S.C. 426, 357 S.E.2d 15 (1987), in which this Court held that real estate closings should be conducted only under the supervision of attorneys. We encourage members of the Bar to review these cases as well as the provisions of the Rules of Professional Conduct cited above which address the delegation of functions to support staff.

PUBLIC REPRIMAND.

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

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

Jane Doe,	Respondent,
v.	
Baby Boy Roe, a minor under the age of fourteen (14) years, South Carolina Department of Social Services, Eric Stern and Patsy Jordan,	Defendants,
Of whom Patsy Jordan is	Appellant.

Appeal From Greenville County
Amy C. Sutherland, Family Court Judge

Opinion No. 3606
Heard January 13, 2003 – Filed March 10, 2003

AFFIRMED

Thomas L. Bruce, of Greenville, for Appellant.

Robert D. Moseley, Jr., of Greenville, for Respondent.

Frances E. Duarte, of Greenville; for Guardian Ad Litem.

HEARN, C.J.: Patsy Jordan (Mother) appeals from a family court order terminating her parental rights to minor child, Baby Boy Roe, and granting his adoption to Roe's foster mother, Jane Doe. We affirm.

FACTS/PROCEDURAL BACKGROUND

On November 17, 1998, Mother gave birth to Roe, who had illegal drugs in his system.[1] The next day, following the South Carolina Department of Social Services' (DSS) assessment that Mother posed a "high risk" of causing harm or physical abuse to Roe, DSS and Mother entered into a safety plan in which she agreed to seek substance abuse treatment. Eight days after Roe's birth, DSS placed him in protective custody. Roe remained hospitalized until placed in a foster home on December 8, 1998.

At the time of Roe's birth, Mother was on probation for drug and shoplifting offenses. By giving birth to a drug-addicted baby, Mother violated her probation, so she was incarcerated from November 1998 until July 1999.

In May 1999, the family court, operating under the assumption Mother had been released from jail, ordered Mother to pay monetary support to Roe. However, a second family court order was issued, dismissing Mother's child support obligation and noting Mother was "still in jail when that order was signed." The family court also ordered Mother to undergo drug and alcohol counseling and attend parenting classes.

When Mother was released from jail in July, she took very few steps toward regaining custody of Roe. Although she did visit Roe, she failed to attend both the recommended outpatient drug treatment program and

[1] Mother also gave birth to a drug-addicted baby in 1992.

parenting classes. By October, Mother was incarcerated again for her tenth shoplifting offense.

Once Mother was released from prison in January 2000, she immediately went into a drug addiction recovery program and began to turn her life around. Mother completed a six-week parenting class in May 2000, and in June, after the family court ordered Mother to pay child support for Roe, she began making payments.

Doe initiated this action to terminate Roe's parents' parental rights on July 21, 2000. Doe also sought to adopt Roe.

The family court terminated Mother's rights based on the child remaining in foster care for fifteen of the last twenty-two months and based on grounds of abandonment, failure to rehabilitate, failure to support, failure to visit, and diagnosable condition. The court also approved Doe's adoption of Roe, concluding the adoption was in Roe's best interests. Mother appeals, arguing that no ground existed to support the termination of her parental rights and that termination was not in Roe's best interests.

STANDARD OF REVIEW

In a termination of parental rights (TPR) case, the best interests of the children are the paramount consideration. South Carolina Dep't of Soc. Servs. v. Smith, 343 S.C. 129, 133, 538 S.E.2d 285, 287 (Ct. App. 2000). Grounds for TPR must be proved by clear and convincing evidence. Hooper v. Rockwell, 334 S.C. 281, 297, 513 S.E.2d 358, 366 (1999); see also Santosky v. Kramer, 455 U.S. 745, 747-48 (1982) ("Before a State may sever completely and irrevocably the rights of parents in their natural child, due process requires that the State support its allegations by at least clear and convincing evidence.").

Furthermore, in a TPR case, the appellate court has jurisdiction to examine the entire record to determine the facts according to its view of the evidence. Richland County Dep't of Soc. Servs. v. Earles, 330 S.C. 24, 32, 496 S.E.2d 864, 866 (1998). This court may review the record and make its

own findings whether clear and convincing evidence supports termination. South Carolina Dep't of Soc. Servs. v. Parker, 336 S.C. 248, 254, 519 S.E.2d 351, 354 (Ct. App. 1999). However, our broad scope of review does not require us to disregard the findings below or ignore the fact the trial judge was in a better position to assess the credibility of the witnesses. Dorchester County Dep't of Soc. Servs. v. Miller, 324 S.C. 445, 452, 477 S.E.2d 476, 480 (Ct. App. 1996).

LAW/ANALYSIS

Under South Carolina's TPR Statute, "[t]he family court may order the termination of parental rights upon a finding of **one or more** of the [listed] grounds and a finding that termination is in the best interest of the child." S.C. Code § 20-7-1572 (2001) (emphasis added). Thus, to terminate parental rights under section 20-7-1572, the family court must first find at least one of the statutory grounds set forth in that section. If the family court finds that a statutory ground for termination has been proven, it must then find that the best interests of the child would be served by termination. Id.

I. Grounds for Terminating Mother's Parental Rights

One ground for terminating a parent's rights under section 20-7-1572 is that the child has lived in foster care for fifteen out of the most recent twenty-two months. In this case, Roe had been in emergency protective custody and foster care since he was eight days old. At the time his foster mother sought to terminate his parents' rights, Roe was twenty-months old. Mother argues that because twenty-two months had not expired, her rights cannot be terminated on this ground. We disagree.

When construing a statute, courts should consider the words of the statute in conjunction with the purpose of the whole statute and the policy of the law. South Carolina Dep't of Soc. Servs. v. Gamble, 337 S.C. 428, 523 S.E.2d 477 (Ct. App. 1999). The stated purpose of South Carolina's TPR statute "is to establish procedures for the reasonable and compassionate termination of parental rights where children are abused, neglected, or

abandoned in order to protect the health and welfare of such children and make them eligible for adoption . . . ." S.C. Code Ann. § 20-7-1560 (1976). Furthermore, case law tells us that TPR statutes must be liberally construed in order to ensure prompt judicial procedures for freeing minor children from the custody and control of their parents by terminating the parent-child relationship. Joiner ex. rel. Rivas v. Rivas, 342 S.C. 102, 108, 536 S.E.2d 372, 375 (2000); South Carolina Dep't of Soc. Servs. v. Parker, 336 S.C. 248, 519 S.E.2d 351 (Ct. App. 1999).

With the purpose of the TPR statute in mind, we find that once a child has been in foster care for fifteen months, whether those months are consecutive or within the last twenty-two months, the parental rights of that child's parents may be terminated upon a showing that termination is in the child's best interests. We believe the legislature included the "within the most recent twenty-two months" language in order to account for children who bounce between a foster home and their parents' home. The language indicates that children need not have been in foster care for fifteen consecutive months before their parents' rights can be terminated, but rather, a ground for termination exists once a child has languished in foster care for **any** fifteen months within the most recent twenty-two-month period.

Here, the fact that Roe was in foster care for the last twenty months is undisputed. Thus, we find the trial court did not err in finding a statutory ground supporting the termination of Mother's parental rights.

II. Roe's Best Interests

Having found one ground on which the family court properly terminated Mother's parental rights, we need only determine that termination of Mother's rights is in Roe's best interests to affirm the family court's termination. See S.C. Code § 20-7-1572. Although we applaud Mother for completing drug rehabilitation and for turning her life around, we believe that Roe's interests would be best served by terminating Mother's rights. See e.g., South Carolina Dep't of Soc. Servs. v. Parker, 336 S.C. 248, 258-259, 519 S.E.2d 351, 356 (Ct. App. 1999) ("The interests of the child shall prevail if the child's interests and the parental rights conflict.").

From the time that Roe was released from the hospital, he resided with Doe, and at the time of the hearing, he was just under twenty-nine months old. DSS professionals testified about the bonds he formed with Doe, as well as the quality of home-life provided by Doe. A behavioral pediatrician testified about the detrimental effect separating Roe and Doe would have on Roe. Additionally, Doe testified about her relationship with Roe and her ability to provide a nurturing, safe, and comfortable home for him. Thus, we find ample evidence in the record to support the family court's termination of Mother's parental rights.

CONCLUSION

For the forgoing reasons, the decision of the circuit court is

AFFIRMED.

CURETON and ANDERSON, JJ., concur.

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

The State, Respondent,

v.

Marion L. Parris, Appellant.

Appeal From Cherokee County
J. Derham Cole, Circuit Court Judge

Opinion No. 3607
Heard November 11, 2002 – Filed March 10, 2003

REVERSED

Assistant Appellate Defender Robert M. Dudek, of Columbia, for Appellant.

Attorney General Henry Dargan McMaster, Chief Deputy Attorney General John W. McIntosh, Assistant Deputy Attorney General Charles H. Richardson, and Assistant Attorney General W. Rutledge Martin, all of Columbia; and Solicitor Harold W. Gowdy, III, of Spartanburg, for Respondent.

SHULER, J.: Marion L. Parris appeals his conviction for breach

of trust with fraudulent intent, arguing the trial court erred in failing to grant his motion for a directed verdict. We agree and reverse.

FACTS/PROCEDURAL HISTORY

Marion Parris owned and operated Parris Home Sales (PHS), a mobile home dealership in Gaffney. PHS had a financing arrangement with First National Bank which included a $750,000 "floor plan" line of credit for the pre-approved purchase of mobile homes. As security, First National had a blanket lien over all PHS business assets. In addition, although titles[1] to the mobile homes in the company's inventory originated in PHS, First National maintained physical possession of all titles until each unit was sold. Upon receipt of payment for its interest, First National transferred possession of the title to either the buyer, if the transaction was a cash sale, or, as was usually the case, the permanent lender financing the purchase.

On February 3, 1999, PHS executed a note to First National for $37,405 to purchase a new double-wide mobile home. The loan agreement authorized PHS to pay only accrued interest, in monthly installments, until February 5, 2000, at which time the entire principal amount would come due. The agreement further provided, in part, that PHS would be in default if it did or failed to do something causing the bank to believe it would have difficulty collecting the amount owed. In case of default, the agreement outlined four enumerated remedies plus "any remedy . . . under state or federal law."

On November 1, 1999, Jerry and Sherry Martin signed a purchase agreement for the mobile home bought by PHS with proceeds from the February 3rd loan. The contract listed a purchase price of $40,340 and stated in pertinent part:

> Title to said [mobile home] shall remain in the Seller until the agreed purchase price therefor [sic] is paid

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[1] Officially known as the "Manufacturer's Statement or Certificate of Origin to a Mobile Home."

> in full ☐ in cash or by the execution of a ☐ Retail Installment Contract, or a Security Agreement and its acceptance by a financing agency; thereupon title to the within described unit passes to the buyer as of the date of either full cash payment or on the signing of said credit instruments even though the actual physical delivery may not be made until a later date.

The sale was consummated on November 18, 1999, when the Martins' lender, Bank of America, issued two checks totaling $40,340 and jointly payable to Jerry Martin and PHS. Pursuant to the terms of the purchase agreement, title to the mobile home passed to the Martins at this time, albeit subject to First National's outstanding lien. Jerry Martin thereafter endorsed the checks and Marcia Jolly, the bank vice president conducting the loan closing, handed them to Parris. Parris told the Martins to "give him a couple of days and he would have everything done and [they] could be moved in by Thanksgiving," then left the bank. The Martins subsequently accepted delivery and took possession of the mobile home on the day before Thanksgiving.

The next day, November 19, Parris opened a checking account with American Federal Bank and deposited the two checks from Bank of America. Thereafter, he withdrew money and wrote checks on the account to himself, PHS, and various other payees; he also deposited an additional $7,858.29 into the account.

On December 6, Sherry Martin noticed First National's president, Steve Moss, "snooping" around the new mobile home. Moss approached, knocked on the door, and asked Martin for the trailer's serial number. When Martin told Moss the number was none of his business, Moss replied "that he had a right to get the serial number, that he owned the home, and that he could repossess it." Sherry Martin, upset and crying, called her husband and told him what Moss had said.

Jerry Martin immediately drove to First National and discussed the matter with Thomas Hale, the bank's Chief Lending Officer. Hale explained

that First National still had the title to the trailer because Parris had not yet paid off the note. When Martin asked if the bank could really take possession of the home, he was told it could and "probably would." Hale then directed Martin to hire a lawyer and go to the police. The Martins did so and the police subsequently arrested and charged Parris with breach of trust with fraudulent intent. Following the arrest, First National accelerated the underlying note and seized PHS's business assets, which it later sold at a discount.

On February 24, 2000, a Cherokee County grand jury indicted Parris for breach of trust with fraudulent intent. Following conviction by a jury on July 25, 2000, the trial court sentenced Parris to ten years imprisonment. This appeal followed.

LAW/ANALYSIS

Standard of Review

In ruling on a motion for directed verdict in a criminal case, a trial court must view the evidence in the light most favorable to the State. See State v. Buckmon, 347 S.C. 316, 555 S.E.2d 402 (2001). In so doing, the court is concerned with the existence of evidence, not its weight. State v. Lollis, 343 S.C. 580, 541 S.E.2d 254 (2001). This Court, in reviewing a refusal to grant the motion, must also view the evidence in a light most favorable to the State. State v. McGowan, 347 S.C. 618, 557 S.E.2d 657 (2001). If the record reveals any direct or substantial circumstantial evidence which reasonably tends to prove guilt, then this Court must find the trial court acted properly in submitting the case to the jury. See Buckmon, 347 S.C. at 321, 555 S.E.2d at 404; Lollis, 343 S.C. at 584, 541 S.E.2d at 256.

On the other hand, if the State fails to present sufficient evidence of the offense, a defendant is entitled to a directed verdict from the court. State v. Walker, 349 S.C. 49, 562 S.E.2d 313 (2002). Hence, "where the facts of the case, even if proved, do not constitute the alleged criminal conduct, a directed verdict must be granted." State v. Jackson, 338 S.C. 565, 569, 527 S.E.2d 367, 369 (Ct. App. 2000).

Discussion

Parris argues the trial court erred in failing to direct a verdict because the State failed to prove he committed a breach of trust. We agree.

Although our Legislature has partially codified the offense of breach of trust with fraudulent intent, its elements remain defined by case law. See S.C. Code Ann. § 16-13-230 (Supp. 2002). In essence, the crime is "larceny after trust, which includes all of the elements of larceny or in common parlance, stealing, except the unlawful taking in the beginning." State v. Scott, 330 S.C. 125, 130, 497 S.E.2d 735, 738 (1998) (quoting State v. Owings, 205 S.C. 314, 316, 31 S.E.2d 906, 907 (1944)). The fact distinguishing larceny from breach of trust is that possession of the property is gained by unlawful means in larceny while a breach of trust is accomplished by a lawful taking of the property, i.e., through its *entrustment* to one by another.[2] See Scott, 330 S.C. at 130, 497 S.E.2d at 738.

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[2] South Carolina is apparently the only jurisdiction to refer to this offense as breach of trust, as our supreme court has noted:

> Breach of trust with fraudulent intention, by that especial designation, is, so far as we are advised, peculiar to this jurisdiction. In other states, the crime, as known to us, is called by different names, such as "larceny after trust," "larceny by a bailee," "larceny by false pretenses," and very commonly as "embezzlement." . . . The general purpose running through the statutes creating and defining these crimes is, however, the same; to declare as a crime, and usually as one coming within the classification of larceny, acts which were formerly not deemed to be larceny at common law, because of the fact that possession of property had been obtained through the consent of the owner.

State v. McCann, 167 S.C. 393, 400, 166 S.E. 411, 414 (1932). Because breach of trust is "so similar in its aspects to embezzlement, as the latter crime is defined and regarded in most American jurisdictions," see id., we will utilize the reasoning employed in extra-

To sustain a conviction, the State must prove every element of the offense charged. Jackson, 338 S.C. at 569, 527 S.E.2d at 369. In breach of trust cases, the central question is whether the defendant "*received the property in trust*," which he later violated. Jackson, 338 S.C. at 569, 527 S.E.2d at 369 (quoting State v. Shirer, 20 S.C. 392, 408 (1884)). The State, therefore, is required to establish the existence of a trust relationship, and in the absence thereof the defendant is entitled to a directed verdict of acquittal. Id. at 569-570, 527 S.E.2d at 370; see State v. LeMaster, 231 S.C. 321, 98 S.E.2d 756 (1957).

A trust is an arrangement whereby property is transferred to another with the intent that it be administered by the trustee for the benefit of the transferor or a third party. See Jackson, 338 S.C. at 570, 527 S.E.2d at 370. As such, it is "a fiduciary relationship . . . *which arises as a result of a manifestation of an intention to create it.*" Restatement (Second) of Trusts § 2 (1959) (emphasis added). In most instances a trust relationship is created by the express intent to do so, either through words or conduct. Id. at § 24.

The instant indictment for breach of trust alleged Jerry Martin "entrusted" Parris with $40,340, which Parris later appropriated for his own use. The mere assertion of a trust relationship, however, is not proof of its existence—the State must present evidence tending to prove the relationship as an element of the crime. Although the indictment failed to specify the nature of the alleged trust, the State's theory of the case, acknowledged in its brief, was that Martin "entrusted" Parris with the two checks in exchange for clear title to the mobile home.

In support of this theory, the State offered testimony from Jerry Martin that he "expected" Bank of America to get a clear title to the home when Parris received the checks. The State further relied on Sherry Martin's testimony that she "expected" Parris's statement at closing was accurate—

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jurisdictional case law, as did the court in McCann, to support our analysis herein.

that "he would have everything done" in a couple of days so that they could move in by Thanksgiving. According to the State, the Martins' testimony reflects a "common understanding" as to when Parris would deliver the checks to First National. We disagree. In our view, the proffered evidence, ambiguous at best, is insufficient to support a finding of a specific trust agreement. See Jackson, 338 S.C. at 571, 527 S.E.2d at 371 ("Absent the manifest intent to create a trust, there could be no trust or trust relationship to breach."); State v. White, 244 S.C. 349, 355, 137 S.E.2d 97, 99 (1964) ("'The [S]tate must prove the exact trust which has been breached . . . .'") (quoting State v. Cody, 180 S.C. 417, 424, 186 S.E. 165, 167 (1936)); Nickles v. State, 80 S.E.2d 97, 101 (Ga. Ct. App. 1954) (To maintain a conviction for larceny after trust, "[t]here must have been a contract [or] understanding between the defendant and the victim whereby the former received the money from the latter *with the distinct agreement and understanding that he would apply the same to a particular use for the benefit of the* [*victim*].") (emphasis added).

Although Parris ultimately failed to deliver good title, perhaps warranting a claim for breach of contract, nothing in the record indicates Martin entrusted him with the purchase price for the express purpose of paying off First National to obtain clear title to the trailer. To the contrary, the record reveals Martin was unaware title was held by anyone other than Parris until December 6, 1999, and thus could not have intended to create a trust when Parris received the checks on November 18.[3] We therefore find the

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[3] Both checks also contained identical endorsement language:

> For value received, by endorsement, the payee does warrant good title to and full right to convey a 1999 Legend Mobile Home serial # THL2936ABAL. [And at the] time of such sale and application of certificate of title thereto, payee has shown a lien in favor of Bank of America . . . .

By endorsing the checks, PHS and Jerry Martin recognized Bank of America's interest in the mobile home as well as their right and ability to convey good title. From this evidence it is apparent neither Martin nor Bank of America realized First National had a priority lien on the

State did not prove a trust relationship in this manner. See LeMaster, 231 S.C. at 323-24, 98 S.E.2d at 757 (reversing breach of trust convictions where evidence showed builders informed clients $2,000 was needed to pay for materials, "specifically some $600 owing to one M. D. Martin," and thereafter received the requested funds but failed to pay Martin; the court rejected the State's argument that the $2,000 payment "was impressed with a special trust," finding no evidence of a trust relationship between the builders and clients in part because the Martin bill was not rendered to builders until seven days after they were handed the $2,000 check); Teston v. State, 390 S.E.2d 437, 439 (Ga. Ct. App. 1990) (finding evidence insufficient to establish trust relationship where residential builder allegedly used proceeds of construction loan for purposes other than building specific house; court stated nothing in loan documents or trial testimony "provided that the funds were to be used *only* for" a particular house). Compare Nickles, 80 S.E.2d at 101 (reversing conviction for larceny after trust because there was no evidence defendant was entrusted with money for a particular purpose) with State v. Joy, 851 P.2d 654, 659 (Wash. 1993) (stating embezzlement conviction may be valid when an agreement between the parties restricts the use of funds to a specific purpose, since the party giving the funds has "an interest in the . . . application of the money to the purpose for which it was entrusted to defendant").[4]

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home; had Bank of America been aware of First National's interest, it likely would have written the checks as jointly payable to Parris and First National rather than Martin. Although Parris perhaps would be amenable to a charge of selling property encumbered by a lien, see S.C. Code Ann. § 29-1-30 (1991), the evidence supports his innocence of breach of trust.

[4] It is instructive to compare the facts of this case with those where the State properly obtained a conviction for breach of trust based on a specific trust, to wit: State v. Jordan, 255 S.C. 86, 90-91, 177 S.E.2d 464, 467 (1970) (upholding stockbroker's conviction where he "divert[ed] money received in trust *for the purchase of [certain] stock*" to personal use rather than applying it "in compliance with the trust") (emphasis added); State v. McCann, 167 S.C. 393, 166 S.E. 411 (1932) (affirming conviction where daughter-in-law

A trust, however, may arise by implication in the absence of an express common intent if there is a fiduciary relationship between the parties, because "[a] person in a fiduciary relation to another is under a duty to act for the benefit of the other as to matters within the scope of the relation." Restatement at § 24.[5] Accordingly, an implied trust may be proved by evidence tending to show the parties' relationship was fiduciary.

The ordinary relationship between unaffiliated parties is not fiduciary. Restatement at § 2. A fiduciary relationship may be created, however, when "one reposes special confidence in another so that the latter, in equity and good conscience, is bound to act in good faith and with due regard to the interests of the one reposing the confidence." SSI Med. Servs., Inc. v. Cox, 301 S.C. 493, 500, 392 S.E.2d 789, 794 (1990); see Steele v. Victory Sav. Bank, 295 S.C. 290, 293, 368 S.E.2d 91, 93 (Ct. App. 1988) ("A 'fiduciary relationship' is founded on trust and confidence reposed by one person in the integrity and fidelity of another."). In general, "mere respect for another's judgment or trust in his character is usually not sufficient to establish such a relationship." Burwell v. S.C. Nat'l Bank, 288 S.C. 34, 41, 340 S.E.2d 786, 790 (1986). Because a fiduciary relationship is based on the trust and confidence reposed by one in the integrity and fidelity of another, the

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endorsed and gave check to father-in-law with instructions to "pay the doctor's bill, the drug bill and the funeral bill and bring the rest back," and father-in-law, in addition to paying the debts as instructed also used part of the proceeds to pay his own grocery bill); State v. Barber, 90 S.C. 565, 73 S.E. 771 (1912) (sustaining conviction of bail bondsman where client's wife entrusted him with $100 *for the purpose of paying a commuted fine* owed by her husband and he instead appropriated the money for his own use) (emphasis added).

[5] Indeed, some relationships are deemed fiduciary as a matter of law. See, e.g., State v. Ezzard, 40 S.C. 312, 18 S.E. 1025 (1894) (principal-agent relationship); State v. Scott, 330 S.C. 125, 497 S.E.2d 735 (Ct. App. 1998) (employer-employee relationship); State v. Johnson, 314 S.C. 161, 442 S.E.2d 191 (Ct. App. 1994) (foundation-trustee relationship).

relationship between the parties must be more than casual. Steele, 295 S.C. at 293, 368 S.E.2d at 93.

To establish the existence of a fiduciary relationship, the facts and circumstances must indicate the party reposing trust in another has some foundation for believing the one so entrusted will act not in his own behalf but in the interest of the party so reposing. Burwell, 288 S.C. at 41, 340 S.E.2d at 790. Moreover, the evidence must show the entrusted party "'actually accepted or induced the confidence placed in him.'" Brown v. Pearson, 326 S.C. 409, 423, 483 S.E.2d 477, 484 (Ct. App. 1997) (citation omitted). This is because "as a general rule, a fiduciary relationship cannot be established by the unilateral action of one party." Steele, 295 S.C. at 295, 368 S.E.2d at 94; see Arnold v. Erkmann, 934 S.W. 2d 621, 630 (Mo. Ct. App. 1996) ("A 'fiduciary duty is not created by a unilateral decision to repose trust and confidence; it derives from the conduct or undertaking of the purported fiduciary.'") (citation omitted); Furr's Inc. v. United Specialty Adver. Co., 385 S.W.2d 456, 459-60 (Tex. Civ. App. 1964) (finding no confidential relationship existed where buyer failed to present evidence seller was aware of confidence buyer claimed to have reposed in him since a "[c]onfidential relationship is a two[-]way street").

Although it appears no South Carolina case has addressed the issue, a wealth of foreign case law describes the commercial relationship between a buyer and seller as ordinarily not fiduciary. See, e.g., Comm. on Children's Television, Inc., v. Gen. Foods Corp., 673 P.2d 660, 676 (Cal. 1983) ("The relationship of seller to buyer is not one ordinarily vested with fiduciary obligation . . . . A fiduciary, by contrast, assumes duties beyond those of mere fairness and honesty . . . he must undertake to act on behalf of the beneficiary, giving priority to the best interest of the beneficiary."); Mabry v. Pelton, 432 S.E.2d 588, 590 (Ga. Ct. App. 1993) ("'The vendor and vendee of property are not, by virtue of such fact, placed in a confidential relationship to each other, but on the contrary are presumed to be dealing at arm's length.'") (citation omitted); Arnold, 934 S.W.2d at 629 ("A buyer who pays the purchase price to a seller for a specific item or contract right is not 'entrusting' the seller with sums of money for 'investment' so as to create a fiduciary relationship."); Am. Driver Serv., Inc. v. Truck Ins. Exch., 631

N.W.2d 140, 145, 148 (Neb. Ct. App.) (finding no fiduciary duty inhered in arm's-length transaction of buyer and seller despite fact sellers generally have greater expertise and superior bargaining power while buyers typically rely on their representations); Hampton Tree Farms, Inc. v. Jewett, 892 P.2d 683 (Or. 1995) (finding no fiduciary relationship between contracting parties based solely on their agreement to buy and sell logs); Schlumberger Tech. Corp. v. Swanson, 959 S.W.2d 171, 176-77 (Tex. 1997) ("[N]ot every relationship involving a high degree of trust and confidence rises to the stature of a fiduciary relationship. . . . [T]he fact that the parties to a transaction trust one another will not, in and of itself, establish a finding of a confidential relationship.") (internal citations omitted).

The testimonial and documentary evidence offered by the State reveals a quintessential buyer-seller relationship between Marion Parris and Jerry Martin. Nothing in the record indicates Martin reposed a special trust or confidence in Parris such that he had a duty to act only in Martin's interest as fiduciary. Instead, the evidence is susceptible of only one inference—that the receipt of the checks by Parris was part of an arm's-length transaction for the purchase of the mobile home; as such, it cannot serve as the basis of a conviction for breach of trust. See Huff v. State, 54 S.E.2d 446, 447 (Ga. Ct. App. 1949) (reversing conviction for larceny after trust where defendant failed to deliver purchased tombstone, court held evidence showed "money was *paid* to [defendant] not *intrusted* to him") (emphasis added); People v. Becker, 111 N.E.2d 491, 498 (Ill. 1953) (reversing conviction of seller because evidence of "a transaction which leads only to the debtor[/]creditor relationship will not support a charge of embezzlement"); State v. Hardin, 627 S.W.2d 908, 911 (Mo. Ct. App. 1982) ("The breach of a contractual duty does not amount to embezzlement . . . ."); People v. Wrieden, 87 N.E.2d 440, 442 (N.Y. 1949) (reversing embezzlement conviction where testimonial evidence revealed transaction "was a purchase and sale [which] completely refutes the charge that defendant occupied a position of trust"); State v. Carr, 13 P.2d 497, 500 (Wash. 1932) (reversing conviction for embezzlement where dealer accepted $500 down payment but failed either to deliver the piano contracted for or refund buyer's deposit; court concluded relationship between parties was that of seller and buyer and dealer's obligation "became only that of a debtor for damages").

While this Court does not condone Parris's actions, "[t]he object of the breach of trust act . . . was not to make criminal the failure to pay a debt." State v. Butler, 21 S.C. 353, 356 (1884). There is no question but that Parris's failure to deliver good title rightfully would subject him to an action for breach of contract. However, where the seller of an item does not receive the money in question in trust but as payment for the item sold, the failure to use the money in a manner beneficial to the buyer does not constitute a misappropriation of the buyer's money. To the contrary, the money once given over legally belongs to the seller, and it is elementary that "one cannot steal or embezzle his own money so as to render himself criminally liable therefor." Carr, 13 P.2d at 500. As the Missouri Court of Appeals has stated: "[A] complaining witness ha[s] no right to invoke criminal process on account of the trouble and expense a civil suit might cause him. 'The criminal courts are neither a collection agency nor a forum for the trial of mere disputes over the ownership of property.'" State v. Morris, 699 S.W.2d 33, 36 (Mo. Ct. App. 1985) (citation omitted).

The evidence presented in this case fails to show the existence of a fiduciary relationship between Parris and Jerry Martin. Instead, it merely evinces a typical buyer-seller relationship between the parties, a relationship not ordinarily fiduciary in nature. Absent the manifest intent to create a trust or evidence establishing the existence of a fiduciary relationship from which one might be implied, the State presented no proof of a trust that was subject to breach. Because the State failed to meet its burden of proving the existence of a trust relationship, the trial court erred in failing to direct a verdict of acquittal on the charge. See LeMaster, 231 S.C. at 324, 98 S.E.2d at 757; Jackson, 338 S.C. at 571-72, 527 S.E.2d at 371.

REVERSED.

GOOLSBY and HUFF, JJ., concur.

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

The State,

Respondent,

v.

Oscar Roy Padgett,

Appellant.

Appeal From Saluda County
William P. Keesley, Circuit Court Judge

Opinion No. 3608
Heard February 11, 2003 – Filed March 10, 2003

AFFIRMED

Senior Assistant Appellate Defender Wanda H. Haile, of Columbia, for Appellant.

Attorney General Henry Dargan McMaster, Chief Deputy Attorney General John W. McIntosh, Assistant Deputy Attorney General Charles H. Richardson and Senior Assistant Attorney General Harold M. Coombs, Jr., all of Columbia; and Solicitor Donald V. Myers, of Lexington, for Respondent.

ANDERSON, J.: Oscar Roy Padgett was convicted of failure to stop for a blue light. The trial court sentenced him to a three-year term of imprisonment. We affirm.

FACTS/PROCEDURAL BACKGROUND

On October 31, 2000 at approximately 8:30 p.m., Officer Gerard Grenier of the Ridge Spring Police Department observed a black Mustang parked at the gasoline pumps at Kent's Corner Gas Station on the corner of Highway 23 and Pecan Grove Road in Ridge Spring. Officer Grenier recognized the vehicle as the same one he had stopped two months earlier for a license tag violation. Padgett was driving the vehicle at the time of the prior stop and had explained to Officer Grenier that he had purchased it only a few days earlier.

Officer Grenier testified that, on the night in question, he saw Padgett get into the vehicle and decided to follow Padgett to ascertain whether he had obtained proper tags for the car. As he "squared off" behind the Mustang on Highway 23, Officer Grenier noticed that no license tags were affixed to the vehicle and, therefore, activated his patrol car's blue lights. He stated the driver of the vehicle did not stop in response to the blue lights, but rather drove slowly for a time, turned onto Trojan Road, accelerated the vehicle, and crossed over Highway 1 into Aiken. According to Officer Grenier, he pursued Padgett with his siren and blue lights on for about three-fourths of a mile outside of Ridge Spring, then terminated the pursuit. He returned to Kent's Corner and questioned the store manager regarding the identity of the person driving the black Mustang. The manager informed Officer Grenier that the driver was Oscar Padgett. Thereafter, Officer Grenier obtained a warrant for Padgett's arrest.

Officer Leroy Smith, who was on patrol with Grenier the night of the pursuit, verified Officer Grenier's account of the events. In particular, Officer Smith confirmed that Officer Grenier turned on the patrol car's blue

lights before Padgett turned onto Trojan Road and, thus, before he left the Ridge Spring city limits.

At the close of the State's case, Padgett moved for a directed verdict of acquittal based generally on lack of sufficient evidence. The trial court denied the motion.

Padgett declared he was not in Ridge Spring on the night of October 31, 2000. He further asserted the transmission on his black Mustang was malfunctioning at the time and had been parked in his back yard.

At the close of evidence, Padgett renewed his motion for a directed verdict. The trial court again denied the motion. The jury returned a guilty verdict.

STANDARD OF REVIEW

On appeal from the denial of a directed verdict, an appellate court must view the evidence in the light most favorable to the State. State v. Walker, 349 S.C. 49, 562 S.E.2d 313 (2002); State v. Morgan, __S.C.__, 574 S.E.2d 203 (Ct. App. 2002). When ruling on a motion for a directed verdict, the trial court is concerned with the existence or nonexistence of evidence, not its weight. State v. Gaster, 349 S.C. 545, 564 S.E.2d 87 (2002); State v. McLauren, 349 S.C. 488, 563 S.E.2d 346 (Ct. App. 2002). A defendant is entitled to a directed verdict when the State fails to produce evidence of the offense charged. State v. McKnight, Op. No. 25585 (S.C. Sup. Ct. filed Jan. 27, 2003) (Shearouse Adv. Sh. No. 3 at 42); State v. McHoney, 344 S.C. 85, 544 S.E.2d 30 (2001). However, if there is any direct evidence or any substantial circumstantial evidence reasonably tending to prove the guilt of the accused, this Court must find the case was properly submitted to the jury. State v. Harris, 351 S.C. 643, 572 S.E.2d 267 (2002); State v. Condrey, 349 S.C. 184, 562 S.E.2d 320 (Ct. App. 2002).

LAW/ANALYSIS

I. Jurisdiction of Law Enforcement Officer

Padgett asserts the trial court erred in failing to direct a verdict of acquittal on the charge of failure to stop for a blue light due to the lack of jurisdiction on the part of the pursuing officer. Padgett claims the officer did not turn on his blue lights until he was "outside the corporate limits according to the city map."

The polestar of the factual inquiry in this case is a determination of when the law enforcement activity began and whether it originated in the town limits.

South Carolina Code Ann. § 17-13-40 (Supp. 2001) provides, in relevant part:

> Law enforcement officer jurisdiction when in pursuit of offender; authority, rights, privileges, and immunities extended.
>
> > (A) When the police authorities of a town or city are in pursuit of an offender for a violation of a municipal ordinance or statute of this State committed within the corporate limits, the authorities may arrest the offender, with or without a warrant, at a place within the corporate limits, at a place within the county in which the town or city is located, or at a place within a radius of three miles of the corporate limits.

Padgett correctly notes that section 17-13-40(A), by its terms, operates to limit the jurisdictional authority of town and city police officers to effectuate arrests. However, the mere fact that there existed some question as to whether the officers in the instant case were operating outside of their jurisdictional limitations does not automatically give rise to the propriety of a directed verdict on the issue. To the contrary, the facts and circumstances

attendant to this case present quintessential factual issues regarding the exercise of the statutory grant of jurisdiction.

The officers' testimony that they initiated the attempted traffic stop inside the Ridge Spring city limits, standing alone, constituted sufficient evidence to defeat Padgett's motion for a directed verdict on the ground the officers lacked jurisdiction to make the stop. Cf. State v. McAteer, 340 S.C. 644, 646, 532 S.E.2d 865, 866 (2000) (concluding that "[s]ince the officer was outside the municipality's city limits when he first observed petitioner, he had no police authority to detain him."). In ruling on the motion for a directed verdict, the trial judge properly limited his inquiry to the existence or nonexistence of evidence tending to establish the officers operated within the confines of section 17-13-40(A), not the weight of that evidence. See State v. Morgan, 282 S.C. 409, 319 S.E.2d 335 (1984). The trial court did not err in denying Padgett's motion for a directed verdict.

II. Reasonable Suspicion to Warrant Traffic Pursuit

Padgett contends the trial court erred in failing to grant his motion for a directed verdict on the charge of failure to stop for a blue light due to the lack of reasonable suspicion to warrant the traffic pursuit. We disagree.

The dissenting opinion in State v. Jihad, 342 S.C. 138, 536 S.E.2d 79 (Ct. App. 2000) (Anderson, J., dissenting), majority opinion rev'd on other grounds, 347 S.C. 12, 553 S.E.2d 249 (2001), articulated:

> A police officer may conduct a constitutionally valid traffic stop when the officer has a reasonable suspicion that either the vehicle or an occupant is subject to seizure for violation of the law. See Delaware v. Prouse, 440 U.S. 648, 99 S.Ct. 1391, 59 L.Ed.2d 660 (1979). As long as an officer reasonably suspects the driver is violating "any one of the multitude of applicable traffic and equipment regulations," the police officer may legally stop the vehicle. Id. at 661, 99 S.Ct. at 1400, 59 L.Ed.2d at 672. Reasonable suspicion is a lesser standard than probable cause and allows an officer to effectuate a stop when there is some objective manifestation of criminal activity involving the person

> stopped. See United States v. Sokolow, 490 U.S. 1, 109 S.Ct. 1581, 104 L.Ed.2d 1 (1989). Reasonable suspicion exists when an officer can identify specific facts that, when taken together with rational inferences from those facts, would warrant a person of reasonable caution in the belief that the detainee has committed (or is committing) a crime. Terry v. Ohio, 392 U.S. 1, 88 S.Ct. 1868, 20 L.Ed.2d 889 (1968). The propriety of a stop must be viewed in light of the totality of the surrounding circumstances. See United States v. Cortez, 449 U.S. 411, 101 S.Ct. 690, 66 L.Ed.2d 621 (1981).
>
> No further inquiry beyond the requirement of reasonable suspicion is necessary or warranted. State v. Carlson, 102 Ohio App. 3d 585, 657 N.E.2d 591 (1995). Thus, if the specific and articulable facts available to an officer indicate a motorist may be committing a criminal act, which includes the violation of a traffic law, the officer is justified in making the stop. Id. Similarly, the United States Supreme Court has concluded an officer's subjective motive does not invalidate behavior that is objectively justified under the Fourth Amendment. See Whren v. United States, 517 U.S. 806, 116 S.Ct. 1769, 135 L.Ed.2d 89 (1996) (police officer may stop driver for any observed traffic offense even if officer's motivation for making stop is unrelated to observed traffic offense). To satisfy the reasonable suspicion standard, the State is not required to prove the suspected motor vehicle violation occurred. State v. Williamson, 138 N.J. 302, 650 A.2d 348 (1994); see also Marben v. State of Minnesota, Dep't of Pub. Safety, 294 N.W.2d 697 (Minn. 1980) (an actual traffic violation need not be detectable; all that is required is that the stop be not the product of mere whim, caprice, or idle curiosity).

Jihad, 342 S.C. at 147-48, 536 S.E.2d at 83-84.

Pursuant to South Carolina Code Ann. § 56-3-1240 (Supp. 2002), "[i]t is unlawful to operate or drive a motor vehicle with the license plate missing and a person who is convicted for violating this section must be punished as

provided by Section 56-3-2520." Officer Grenier testified he noticed that the vehicle he pursued on October 31, 2000 did not have a license tag affixed to it. Because the mere act of driving a vehicle without a license plate is a chargeable offense, Officer Grenier's observation that the plate was missing from the vehicle constituted reasonable suspicion to initiate the traffic stop. The fact that Officer Grenier was prompted to check for the missing license plate by his recollection of a prior stop of the same vehicle does not negate the existence of reasonable suspicion to initiate the stop when he actually observed Padgett committing a traffic offense on the night in question. Concomitantly, we find the case was properly submitted to the jury.

CONCLUSION

Accordingly, for the foregoing reasons, Padgett's conviction is

AFFIRMED.

CONNOR and HUFF, JJ., concur.

4THE STATE OF SOUTH CAROLINA
In The Court of Appeals

The State, **Respondent,**

v.

Curtis Frank Cuccia, **Appellant.**

Appeal From York County
John C. Hayes, III, Circuit Court Judge

Opinion No. 3609
Submitted February 10, 2003 – Filed March 10, 2003

AFFIRMED

Stephen D. Schusterman, of Rock Hill, for Appellant.

Christopher Edward Anthony Barton, of Rock Hill, for Respondent.

ANDERSON, J.: Curtis Cuccia was charged with driving under the influence (DUI), open container, possession of beer by a person under

twenty-one years old, and speeding. His driver's license was suspended due to registering a blood-alcohol level of two one-hundredths of one percent (.02%) or more and being under twenty-one years old. He pled guilty to the open container charge, and the possession of beer and speeding charges were nolle prossed. Cuccia was subsequently convicted of DUI. Cuccia appeals his DUI conviction and sentence. We affirm.[1]

FACTS/PROCEDURAL BACKGROUND

Municipal Judge Modla's Return to Appeal details the testimony presented by the arresting officer, Officer Biggers. Officer Biggers testified that he stopped Cuccia for speeding. When Cuccia exited his vehicle, Officer Biggers smelled alcohol and noticed Cuccia was very unsteady on his feet. Cuccia failed four field sobriety tests. Officer Biggers averred that he observed an open beer bottle on the floorboard. At the time of Cuccia's arrest, he was nineteen years old.

Officer Pruett performed a Breathalyzer test. The test result indicated Cuccia's alcohol concentration was twenty-one one-hundredths of one percent (.21%), well above the two one-hundredths of one percent (.02%) limit for suspending his license under S.C. Code Ann. section 56-1-286(A) (Supp. 2002). The level is also above ten one-hundredths of one percent (.10%) or more, where it may be inferred that the person was under the influence of alcohol under S.C. Code Ann. section 56-5-2950(b)(3) (Supp. 2002).

After the test was performed, a Notice of Suspension form was completed in which two boxes were checked as the reason for the suspension of Cuccia's license. The first box was for registering an alcohol concentration of .02% or more while under the age of twenty-one, and the second checked box was for registering an alcohol concentration of .15% or more. Officer Biggers elected to pursue the suspension as a result of Cuccia's alcohol concentration of .02% or greater and the fact he was under the age of twenty-one.

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[1] We decide this case without oral argument pursuant to Rule 215, SCACR.

Cuccia pled guilty to the open container charge, and the possession of beer and speeding charges were nolle prossed. At the trial on the DUI charge, Cuccia moved to dismiss the charge contending that it would be double jeopardy for him to have his license revoked and to face the charge of DUI. The motion to dismiss was denied on the grounds that Cuccia was arrested for DUI, but his license was suspended under an administrative or civil sanction and was not a criminal penalty barring subsequent prosecution for DUI. Cuccia was subsequently convicted of DUI and sentenced to thirty days incarceration or a fine of $559.00.

LAW/ANALYSIS

I. CIVIL SANCTION

Cuccia maintains his protection from double jeopardy was violated when his license was suspended under S.C. Code Ann. section 56-1-286(A) (Supp. 1998) and he was subsequently tried under S.C. Code Ann. section 56-5-2930 (Supp. 1999) for DUI. We disagree.

Section 56-1-286(A) (Supp. 2002) states:

> In addition to any other penalty imposed by law unless otherwise prohibited in this section, including additional driver's license suspensions, the Department of Public Safety must suspend the driver's license, permit, or nonresident operating privilege of, or deny the issuance of a license or permit to a person under the age of twenty-one who drives a motor vehicle and has an alcohol concentration of two one-hundredths of one percent or more. The department shall not suspend a person's privilege to drive under this section if the person's privilege to drive has been suspended for a violation of Section 20-7-8920, 20-7-8925, or 56-5-2930 arising from the same incident.

Both the United States Constitution and the South Carolina Constitution protect against double jeopardy. The United States Constitution, which is applicable to South Carolina through the Fourteenth Amendment, provides: “[N]or shall any person be subject for the same offence to be twice put in jeopardy of life or limb . . . .” U.S. Const. Amend. V. The South Carolina Constitution states: “No person shall be subject for the same offense to be twice put in jeopardy of life or liberty . . . .” S.C. Const. Art. I, § 12. The “guarantee [against double jeopardy] has been said to consist of three separate constitutional protections. It protects against a second prosecution for the same offense after acquittal. It protects against a second prosecution for the same offense after conviction. And it protects against multiple punishments for the same offense.” North Carolina v. Pearce, 395 U.S. 711, 717, 89 S. Ct. 2072, 2076, 23 L. Ed. 2d 656, 664-65 (1969) (overruled on other grounds by Alabama v. Smith, 490 U.S. 794, 109 S.Ct. 2201, 104 L.Ed.2d 865 (1989)); accord Schiro v. Farley, 510 U.S. 222, 114 S.Ct. 783, 127 L.Ed.2d 47 (1994); Justices of Boston Mun. Ct. v. Lydon, 466 U.S. 294, 104 S.Ct. 1805, 80 L.Ed.2d 311 (1984); United States. v. DiFrancesco, 449 U.S. 117, 101 S.Ct. 426, 66 L.Ed.2d 328 (1980); Brown v. Ohio, 432 U.S. 161, 97 S.Ct. 2221, 53 L.Ed.2d 187 (1977); United States v. Watson, 420 U.S. 332, 95 S.Ct. 1013, 43 L.Ed.2d 232 (1975); Stevenson v. State, 335 S.C. 193, 198, 516 S.E.2d 434, 436 (1999); McMullin v. South Carolina Dep’t of Revenue & Taxation, 321 S.C. 475, 478, 469 S.E.2d 600, 602 (1996); State v. Owens, 309 S.C. 402, 405, 424 S.E.2d 473, 475 (1992); see also In re Matthews, 345 S.C. 638, 648, 550 S.E.2d 311, 316 (2001) (“The Double Jeopardy Clause protects against multiple punishments for the same offense.”).

> If there is anything settled in the jurisprudence of England and America, it is that no man can be twice lawfully punished for the same offence. And though there have been nice questions in the application of this rule to cases in which the act charged was such as to come within the definition of more than one statutory offence, or to bring the party within the jurisdiction of more than one court, there has never

> been any doubt of its entire and complete protection of the party when a second punishment is proposed in the same court, on the same facts, for the same statutory offence.

Ex Parte Lange, 85 U.S. 163, 168, 21 L. Ed. 872 (1873). However, the Double Jeopardy Clause does not prohibit the imposition of all additional sanctions that could, "in common parlance," be described as punishment. Hudson v. United States, 522 U.S. 93, 98-99, 118 S.Ct. 488, 493, 139 L.Ed.2d 450 (1997). "The Clause protects only against the imposition of multiple criminal punishments for the same offense." Id. at 99, 118 S.Ct. at 493, 139 L.Ed.2d at 458 (emphasis in original). Nevertheless, the Clause may prevent the government from subjecting a defendant to both a criminal punishment and a civil sanction. State v. Price, 333 S.C. 267, 270, 510 S.E.2d 215, 217 (1998). The Double Jeopardy Clause is not automatically violated by the mere fact that a civil penalty has some deterrent effect. Id. at 270-71, 510 S.E.2d at 218. To determine whether a penalty is criminal or civil, a court must look to the face of the statute and then determine if the statutory scheme is so punitive in purpose or effect as to transform what was intended as a civil sanction into a criminal penalty. Id. at 271, 510 S.E.2d at 218.

> Whether a particular punishment is criminal or civil is, at least initially, a matter of statutory construction. A court must first ask whether the legislature, "in establishing the penalizing mechanism, indicated either expressly or impliedly a preference for one label or the other." Even in those cases where the legislature "has indicated an intention to establish a civil penalty, we have inquired further whether the statutory scheme was so punitive either in purpose or effect," as to "transfor[m] what was clearly intended as a civil remedy into a criminal penalty.

Hudson, 522 U.S. at 99, 118 S.Ct. at 493, 139 L.Ed.2d at 459 (internal citations omitted); see also In re Matthews, 345 S.C. 638, 648, 550 S.E.2d

311, 316 (2001) ("As the United States Supreme Court recently reiterated, the determination whether a statute is civil or criminal is primarily a question of statutory construction, which must begin by reference to the act's text and legislative history."). "Only the clearest proof will suffice to override legislative intent and transform what has been denominated as a civil remedy into a criminal penalty." Price, 333 S.C. at 271, 510 S.E.2d at 218; accord In re Matthews, 345 S.C. at 648, 550 S.E.2d at 316. The Hudson court enunciated seven factors for determining if a statute constitutes a criminal penalty:

> (1) [w]hether the sanction involves an affirmative disability or restraint; (2) whether it has historically been regarded as a punishment; (3) whether it comes into play only on a finding of scienter; (4) whether its operation will promote the traditional aims of punishment-retribution and deterrence; (5) whether the behavior to which it applies is already a crime; (6) whether an alternative purpose to which it may rationally be connected is assignable for it; and (7) whether it appears excessive in relation to the alternative purpose assigned.

Hudson 522 U.S. at 99-100, 118 S.Ct. at 493, 139 L.Ed.2d at 459.

Section 56-1-286 allows for the suspension of a driver's license where the person is under the age of twenty-one and registers a blood alcohol concentration of two one-hundredths of one percent (.02%) or more.

The South Carolina Supreme Court, in State v. Price, 333 S.C. 267, 510 S.E.2d 215 (1998), undertook an exhaustive examination of the administrative revocation of a driver's license for the refusal to submit to a Breathalyzer exam and determined that it is not a criminal penalty.[2] Id. at

[2] The Court scrutinized former S.C. Code Ann. section 56-5-2950 (Supp. 1997), which read, "If a person under arrest refuses, upon the request of a law enforcement officer, to submit to chemical tests as provided in

274, 510 S.E.2d at 219. The court found the following factors determinative in reaching its conclusion: (1) the authority to impose the suspension is vested in an administrative agency [the Department of Public Safety]; (2) the ability to operate a motor vehicle on the highways is a privilege, rather than a right; (3) "the purpose of the revocation is to protect the public and not to punish the licensee;"[3] (4) "the sanctions here do not involve an 'affirmative disability or restraint' as that term is normally understood;" (5) the sanction "come[s] into play only upon a finding of scienter, i.e., refusal to submit to testing, no one of these factors alone is dispositive," (6)"although the sanction of license revocation may serve the goals of punishment (i.e., deterrence and retribution), the primary goal . . . is to protect the public;" and (7) "nearly every other court which has addressed the issue finds no double jeopardy problem is posed by the administrative suspension of a driver's license following a drunk driving arrest or refusal to submit to chemical testing." Id. at 272-74, 510 S.E.2d at 218-19.

We find no reason why the rationale enounced in Price is not equally efficacious in an analysis of a suspension under section 56-1-286. The section makes clear that the suspension is in addition to any other penalties which are imposed by law. It is clearly not intended to be the sole criminal penalty for a person under the age of twenty-one who drives while under the influence of alcohol. The statute gives authority to the Department of Public Safety to handle the suspension. As in Price, the mere fact that the conduct for which the sanction is imposed is also criminal is insufficient to render the sanction criminally punitive. Id. at 273-74, 510 S.E.2d at 219.

Accordingly, we find the revocation of a driver's license, where a driver under the age of twenty-one registers a blood alcohol concentration of

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subsection (a) of this section, . . . the department, . . . shall suspend his license or permit to drive, or any nonresident operating privilege for a period of ninety days." The section is now codified at S.C. Code Ann. section 56-5-2951 (A) (Supp. 2001).

[3] Price, 333 S.C. at 272, 510 S.E.2d at 218 (quoting Parker v. State Highway Department, 224 S.C. 263, 271, 78 S.E.2d 382, 386 (1953)).

two one-hundredths of one percent (.02%), is a civil sanction which has not been transformed into a criminal punishment.

II. SAME ELEMENTS TEST

Under traditional double jeopardy analysis, multiple punishment is not prohibited where each offense calls for proof of a fact that the other does not. State v. Owens, 309 S.C. 402, 405, 424 S.E.2d 473, 475 (1992). The United States Supreme Court and the South Carolina Supreme Court have determined that in the context of criminal penalties, the Blockburger v. United States, 284 U.S. 299, 52 S. Ct. 180, 76 L. Ed. 306 (1932) "same elements" test is the sole test of double jeopardy in successive prosecutions and multiple punishment cases. See United States v. Dixon, 509 U.S. 688, 113 S. Ct. 2849, 125 L. Ed. 2d 556 (1993); State v. Easler, 327 S.C. 121, 489 S.E.2d 617 (1997) ("[W]e decline to extend broader protection under our state constitution than that afforded under the federal constitution."). As the South Carolina Supreme Court noted in Price, "if a sanction is determined to be civil in nature and has not been transformed into a criminal penalty, then the double jeopardy clause is not implicated and there is simply no need to conduct a Blockburger analysis." Price, 333 S.C. at 271, n.4, 510 S.E.2d at 218, n.4.

However, once a sanction is found to be a criminal penalty, the Blockburger "same elements" test would apply. Blockburger insists upon a comparison of the elements of the two offenses to determine if "each provision requires proof of an additional fact which the other does not." Blockburger, 284 U.S. at 304. A mere overlap in proof does not constitute a double jeopardy violation. State v. Owens, 309 S.C. 402, 405, 424 S.E.2d 473, 475 (1992).

Section 56-1-286 allows for the suspension of the driver's license of (1) a person, (2) under the age of twenty-one, (3) who drives, (4) a motor vehicle, and (5) has a blood alcohol concentration of two one-hundredths of one percent or more. Section 56-5-2930 makes it unlawful for (1) a person, (2) to drive, (3) a motor vehicle, (4) while under the influence of alcohol, and

(5) to the extent that the person's faculties to drive are materially and appreciably impaired.

Section 56-5-2930 (Supp. 2002) provides:

> It is unlawful for a person to drive a motor vehicle within this State while:
>
> (1) under the influence of alcohol to the extent that the person's faculties to drive are materially and appreciably impaired;
> (2) under the influence of any other drug or a combination of other drugs or substances which cause impairment to the extent that the person's faculties to drive are materially and appreciably impaired; or
> (3) under the combined influence of alcohol and any other drug or drugs or substances which cause impairment to the extent that the person's faculties to drive are materially and appreciably impaired.

Even if we were to find the suspension of Cuccia's license under section 56-1-286 was a criminal penalty, we hold, pursuant to the Blockburger "same elements" test, that a subsequent prosecution for DUI does not violate Cuccia's double jeopardy protections. The two provisions do not necessitate proof of identical elements. One needs an age under twenty-one with a blood alcohol of above .02%, while the other is for any age driver whose faculties to drive are "materially and appreciably impaired." Violation of one provision does not result in an automatic finding of a violation of the other provision. Accordingly, pursuant to the Blockburger "same elements" test, suspending Cuccia's license under section 56-1-286 does not prohibit a subsequent prosecution under section 56-5-2930 for DUI, as the provisions require proof of different facts.

CONCLUSION

We find the administrative suspension of Cuccia's driver's license for driving with a blood alcohol level of two one-hundredths of one percent or more while under the age of twenty-one is a civil sanction and not a criminal penalty. Additionally, we conclude even if it were transformed into a criminal penalty, the elements for suspension of the license under section 56-1-286 are not the same as the elements for prosecuting a DUI under section 56-5-2930. Indubitably, Cuccia was properly prosecuted for DUI, subsequent to the revocation of his driver's license, without violation of the Double Jeopardy Clause.

AFFIRMED.

CONNOR and HUFF, JJ., concur.

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

Thomas Durrette Wooten, Jr.,	Plaintiff,
v.	
Mona Rae Howell Wooten,	Defendant and Third-Party Plaintiff,
v.	
Pam Perry,	Third-Party Defendant,
OF WHOM Thomas Durrette Wooten, Jr., is the	Appellant,
and Mona Rae Howell Wooten is the	Respondent.

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

Opinion No. 3610
Heard January 13, 2003 – Filed March 10, 2003

AFFIRMED AS MODIFIED IN PART and REVERSED AND REMANDED IN PART

C. Dixon Lee, II, and James T. McLaren, of Columbia; Lon H. Shull, of Mt. Pleasant; for Appellant.

Robert N. Rosen, of Charleston; for Respondent.

HEARN, C.J.: Thomas Durrette Wooten, Jr., (Husband) appeals several aspects of a divorce decree, including the award of the marital home to Wife, the identification of certain credit card charges incurred after the parties' separation as marital debt, the decision to grant Wife permanent alimony of $4,300 per month, and the award to Wife of $52,917.21 in attorney's fees and costs. We affirm as modified in part and reverse and remand in part.

Husband and Mona Rae Wooten (Wife) were married in 1976. They have three children, all of whom are past the age of majority.

The parties married while Husband was completing medical school and Wife was employed as a nursing instructor at The Medical University of South Carolina. Husband finished his residency in 1980 and the couple moved to Columbia for him to pursue open-heart surgery anesthetics. A year later they moved back to the Charleston area and purchased a riverfront home on Johns Island. The couple transformed the house, which was described as "barely livable," into a five-bedroom home containing nearly 5,000 square feet and valued at $675,000.00 at the time of the divorce hearing.

During the marriage, the parties enjoyed a comfortable, if not extravagant lifestyle, which was largely centered on outdoor activities such as boating, hunting, and fishing. Husband and the parties' older daughter and son were actively involved in hunting and fishing. Wife described fishing as Husband's "main love."

Wife stayed home with the children while they were small and worked in Husband's practice as a bookkeeper. In 1995, Wife went to work in the Charleston County Coroner's office. At the time of trial, Wife was

employed as the deputy coroner for Charleston County earning a salary of approximately $47,000 per year. Husband was earning approximately $217,000 per year.

At some point during the marriage, Husband admitted to Wife that he had been unfaithful to her with the wife of another anesthesiologist while away at a medical meeting. Wife testified that Husband also admitted to her that he had been sexually intimate with the wife of a fishing buddy. Husband, however, testified that he had only engaged in a one-night stand with the wife of someone he fished with while at a fishing tournament in Kiawah.

In 1986 or 1987, approximately twelve years before the parties separated, Wife began a year-long affair with a family friend. The affair continued even after Husband confronted Wife, and subsequently the parties entered counseling. The parties saw four or five different counselors during this troubled time in their marriage.

In February of 1999, Husband left the marital home and subsequently underwent a vasectomy. Although Wife sought a reconciliation, Husband informed the parties' marriage counselor that he no longer loved Wife and only wanted to discuss a division of their marital assets.

Husband commenced this action in June of 1999 for an order of separate maintenance and support and an equitable division of the parties' assets and debts. Wife answered and counterclaimed seeking a divorce on the ground of adultery, possession and ownership of the marital home, equitable division of marital property, alimony, and attorney's fees.

At trial, the parties announced they had reached an agreement regarding the division of their personal property. Husband also conceded that Wife was entitled to alimony and to an equal division of the marital estate. The remaining issues were tried over a five-day period after which the family court judge issued a final order granting Wife a divorce on the ground of adultery.

Although Husband conceded at trial that Wife was entitled to a fifty-fifty division of the marital estate, he requested that the only asset of the parties that can be readily liquidated, the marital home, be sold to accomplish this division. The court valued the marital estate at $1,571,103.[1] To accomplish the fifty-fifty division of the marital estate, the family court judge awarded the marital home to Wife, together with its mortgage debt, her retirement account, and $137,395.50 from Husband's retirement account. Husband was awarded his interest in his medical practice valued at $41,000, the remainder of his retirement account, and indebtedness totaling $83,552. The family court also awarded Wife $4,300 per month in permanent, periodic alimony, and $52,917.21 in attorney's fees and costs.

STANDARD OF REVIEW

On appeal from the family court, this court has jurisdiction to find the facts in accordance with our own view of the preponderance of the evidence. Murdock v. Murdock, 338 S.C. 322, 526 S.E.2d 241 (Ct. App. 1999). However, we are mindful of the fact that the family court judge, who had an opportunity to observe the witnesses, was in a better position to evaluate their testimony. Smith v. Smith, 327 S.C. 448, 486 S.E.2d 516 (Ct. App. 1997).

DISCUSSION

I. Credit Card Debt

Husband asserts the family court judge erred in identifying $12,332 in credit card charges incurred by Wife after the parties' separation as marital debt and in allocating that debt to him. We agree.

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[1] The marital estate consisted of the marital home valued at $675,000, with equity of $539,349; Husband's retirement accounts valued at $844,026; Wife's retirement account valued at $11,077; and, Husband's interest in his medical practice valued at $41,000.

Wife testified that although Husband initially paid all household bills when he left the marital home, sometime in June of 1999 he told her that she should start paying some of the bills. After that time, and up until the time of the temporary hearing, Husband paid the mortgage payments on the marital home while Wife used her credit card for other expenses such as food and veterinary bills. Wife testified that she had a credit card bill of $12,322. The family court judge treated this debt as a marital debt subject to equitable apportionment. We find that this was error.

"Marital property" for purposes of the South Carolina Apportionment of Marital Property Act is defined in S.C. Code Ann. § 20-7-473 (Supp. 2002) as "all real and personal property which has been acquired by the parties during the marriage and which is owned as of the date of filing or commencement of marital litigation . . . ." (emphasis supplied). Moreover, in making an equitable apportionment, the family court should consider ". . . any other existing debts incurred by the parties or either of them during the course of the marriage[.]" S.C. Code Ann. § 20-7-472(13) (Supp. 2002). "[S]ection 20-7-472 creates a [rebuttable] presumption that a debt of either spouse incurred prior to marital litigation is a marital debt and must be factored in the totality of equitable apportionment." Hardy v. Hardy, 311 S.C. 433, 436, 429 S.E.2d 811, 813 (Ct. App. 1993) (emphasis supplied).

Because it is undisputed Wife incurred these credit card charges subsequent to the filing of marital litigation, it was error for the family court judge to have considered them as a marital debt subject to equitable apportionment.[2] Accordingly, we reverse this portion of the family court's order allocating the credit card debt to Husband.

II. Marital Home

Husband next contends the family court judge erred in awarding Wife ownership of the marital home as part of her share of the marital estate,

[2] We express no opinion as to whether or not the family court could have required Husband to reimburse Wife for some or all of these charges as an incident of support.

arguing it was inequitable to award Wife the only asset of the parties that readily lends itself to liquidation. We agree.

Husband's position throughout trial was that although Wife was entitled to share equally in the marital estate, the marital home should be sold to enable the parties to capture its substantial equity. At the time of trial, the marital home, which was titled in Wife's name, had equity of at least $539,349. Husband proposed that the home be jointly titled in both parties' names and sold so that the parties could combine their $250,000 exclusions for capital gains taxes. Gerald Feinberg, a CPA, testified for Husband concerning the tax consequences to the parties of the various methods of equitable distribution. Feinberg testified that if the parties sold the marital home together, they could take advantage of the joint capital gains exclusion of $500,000. He further testified that if Wife was awarded the home and Husband had to liquidate his retirement account in order to satisfy the remaining equitable division award and to make a down payment on a residence for himself, he would suffer substantial tax and withdrawal penalties. Feinberg testified these penalties would result in Husband losing fifty-one percent of the value of any retirement funds he withdrew. Wife, on the other hand, testified that she wanted to be awarded the marital home in partial satisfaction of her equitable share because "[I]t's my home. It's where my life is centered. ...It's where I have my kids and enjoyment. It's where I have my friends and enjoyment."

In awarding the marital home to Wife as part of her equitable share, the family court judge specifically stated that she had not given Husband's fault any weight. She likewise held that in awarding the home to Wife, she did not consider the children's use of the home, as they were all emancipated and Husband had no obligation to support them other than their college education. These findings were not appealed from and are therefore the law of this case. See Buckner v. Preferred Mut. Ins. Co., 255 S.C. 159, 177 S.E.2d 544 (1970) (stating that an issue which is not challenged on appeal, whether right or wrong, becomes the law of the case).

Additionally, the family court judge specifically noted that she had not considered the tax ramifications of the sale of the house and the

taxability of the pension payments. Relying on Ellerbe v. Ellerbe, 323 S.C. 283, 473 S.E.2d 881 (Ct. App. 1996), the family court judge found that she was precluded from dividing the parties' property based on after-tax dollars stating that, "To make a decision based on after-tax dollars is for this Court to engage in speculation as to what the parties will do in the future."

The apportionment of marital property is within the family court judge's sound discretion and will not be disturbed on appeal absent an abuse of that discretion. Bowers v. Bowers, 349 S.C. 85, 97, 561 S.E.2d 610, 616 (Ct. App. 2002). Section 20-7-472 lists fifteen factors for the family court to consider when making an equitable apportionment of the marital estate and vests the family court with the discretion to determine what weight should be assigned to each factor. On review, this court looks to the overall fairness of the apportionment, and if the result is equitable, taken as a whole, that this court might have weighed specific factors differently than the family court is irrelevant. Id.

We find the family court judge abused her discretion in awarding the marital home to Wife as part of the equitable division. Case law indicates that the family court judge should first attempt an in-kind distribution. Stevenson v. Stevenson, 295 S.C. 412, 415, 368 S.E.2d 901, 903 (1988). However, an in-kind distribution is most equitable where the assets being divided are similar in character. In our view, the family court judge's decision to award Wife the major marketable asset of the parties, while awarding Husband primarily his retirement account, was not an equitable in-kind distribution. Under Husband's proposal, all assets of the parties would have been equally divided on a fifty-fifty basis. Under Wife's proposal, the captured equity in the marital home was viewed as being equivalent to Husband's retirement plan, despite the fact that the equity in the marital home was readily available with little or no tax consequence to Wife and the funds in Husband's retirement plan were subject to a total penalty of fifty-one percent if withdrawn.

Wife presented no testimony to dispute the testimony of Husband and his expert concerning the tax ramifications of the proposals for equitable division. Therefore, in this case it is uncontradicted that the Husband's

proposal for equitable division would have allowed the parties to take advantage of the joint $500,000 capital gains exclusion while the Wife's proposal would result in the Husband incurring a severe penalty of over fifty per cent in the liquidation of a portion of his retirement fund. Moreover, we believe the family court incorrectly concluded that appellate case law precluded her from considering the tax consequences of the equitable distribution.

In Ellerbe, the husband asserted the family court judge erred in discounting the value of the parties' retirement plans when the order did not require the plans to be liquidated. This court agreed, finding that "[b]ecause we see no need for the accounts to be liquidated, we hold the family court erred in valuing the parties' retirement accounts at 48% of their face values." 323 S.C. at 289, 473 S.E.2d at 885 (emphasis supplied). Here, as in Ellerbe, the family court's order does not contemplate the liquidation of the Husband's retirement account. However, we believe it was an error for the family court to have disregarded Husband's substantial evidence establishing the necessity to withdraw funds from his retirement account to comply with the family court's division of the marital property. Because the family court should have recognized Husband's need to liquidate the account, the tax consequences of that liquidation should have been considered. See S.C. Code § 20-7-472(11) (Supp. 2002) (specifically requiring the family court to consider "the tax consequences to each or either party as a result of any particular form of equitable apportionment[.]"). The family court judge apparently interpreted Ellerbe to hold that potential tax ramifications should never be considered by the family court in deciding how to fashion an equitable division if the chosen method of division in the order does not expressly require liquidation of an asset. This restrictive interpretation is flawed where, as here, in comparing competing alternatives for division of the property, the tax consequences should have been considered in order to accomplish an equitable division in the first place.

We likewise find the case of Bowers distinguishable. In Bowers, this court declined to find error when the family court judge failed to consider the tax consequences resulting from its award to the wife of one-half the value of the husband's 401(k) account. Citing Ellerbe, this court found no

abuse of discretion, but stated there was no evidence that either party anticipated liquidation of the account. This is in marked contrast to the evidence presented here from Husband and his expert witness that he would be required to liquidate his retirement account in order to comply with the order and to acquire a home for himself.

South Carolina appellate courts have carefully protected the rights of spouses to realize the benefits of equity in a marital home. For instance, before awarding a spouse the exclusive possession of the home as an incident of support, family courts are required to "carefully consider the claim of a party that the interests of that party or the children are so predominant, when balanced against the interests of the other, that an award of exclusive possession of the marital home is compelled." Johnson v. Johnson, 285 S.C. 308, 311, 329 S.E.2d 443, 445 (Ct. App. 1985) (emphasis added). The rationale for scrutinizing such requests lies in the substantial burden upon the party who must defer realization of the value of his or her share of the marital home. Morris v. Morris, 335 S.C. 525, 534, 517 S.E.2d 720, 725 (Ct. App. 1999). In Morris, the only assets of significant value were the marital home and the retirement account. This court found the family court judge properly denied the wife's request for exclusive possession of the marital home as an incident of support. Significantly, we stated, "By delaying [the husband's] realization of his equity in the home, he is left with no liquid assets with which to establish his new life, apart from the income he earns." Id. (emphasis added).

We see no reason to apply less protection in cases considering the exclusive award of the marital home to one spouse, against the other's desire, as that spouse's share of the marital estate. Wife presented no evidence to compel the family court to award her the exclusive possession of the home. The realization of Husband's share of the equity in the present case is not merely delayed; it is terminated. We believe this result casts an even more inequitable burden upon Husband than cases awarding exclusive possession as an incident of support. The family court's apportionment of the marital estate requires Husband to begin anew without the benefit of his share of the equity accumulated in the only marketable asset of the marital estate; a result we disapproved of in Morris.

Taking our own view of the evidence presented in this case, we do not believe that the apportionment of marital assets was fair to both parties. Wife's emotional attachment to the marital home should not outweigh the undisputed expert testimony that in order to effect a division which is equitable to both parties, the marital home should be sold and the parties should realize the benefits of the $500,000 capital gains exclusion. We find it was error for the family court judge to have viewed these two assets– the equity in the marital home and Husband's retirement plan–as though they were equivalent assets. The family court abused its discretion in awarding the marital home to Wife in the face of undisputed testimony that both parties would realize a significant tax benefit by selling the home and dividing its proceeds. Accordingly, we reverse this portion of the family court's order and remand this issue back to the family court to enter an order consistent with this opinion.

III. Alimony

Husband next argues the family court judge's award of $4,300 per month in permanent periodic alimony was excessive. Although the alimony award does not appear excessive in view of the disparity in the parties' incomes and the length of the marriage, the family court judge based this alimony award upon her assumption that Wife would be residing in the marital home. Accordingly, she considered Wife's many needs and expenses that would be associated with her ownership and maintenance of that home, such as an additional $300 to be used by Wife in acquiring a boat. Because we have reversed that portion of the family court order which awarded Wife the marital home as part of her equitable apportionment, we feel compelled to remand the issue of alimony to the family court for recalculation in light of Wife's present needs. See Ellerbe, 323 S.C. at 297, 473 S.E.2d at 889 (remanding the issue of alimony for reconsideration in light of remanding the issue of the equitable division award, which is a factor relevant to the award of alimony).

IV. Attorney's Fees and Costs

Finally, Husband asserts the family court judge erred in awarding Wife $52,917.21 in attorney's fees and costs.[3] He argues the court erred in awarding any fees to Wife because of the numerous errors he asserts she made in the trial order. He further contends the amount of the award was excessive given his financial condition. We disagree.

An award of attorney's fees will not be overturned absent an abuse of discretion. Stevenson, 295 S.C. at 415, 368 S.E.2d at 903. In deciding whether to award attorney's fees, the family court should consider the parties' ability to pay their own fee, the beneficial results obtained by counsel, the respective financial conditions of the parties, and the effect of the 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). When determining the amount of fees to award, the court is to consider the nature, extent, and difficulty of the services rendered, the time necessarily devoted to the case, counsel's professional standing, the contingency of compensation, the beneficial results obtained, and the customary legal fees for similar services. Glasscock v. Glasscock, 304 S.C. 158, 403 S.E.2d 313 (1991).

Even though Husband prevailed on two of the equitable division issues in this appeal, the beneficial results obtained are only one of several factors to be considered by the family court in deciding whether or not to award attorney's fees. The other factors outlined above clearly militate in favor of an award to Wife. Moreover, Wife's attorney received a favorable result on the issue of divorce and on the issue of alimony, which this court remanded only because of our decision on the equitable division of the marital home. Finally, Husband commenced this action for separate support and maintenance and Wife was required to obtain competent counsel to defend it.

[3] Husband had already contributed $25,547.50 toward Wife's fees at the time of trial for a total award of $75,129.21.

Nor are we persuaded that the amount of fees and costs awarded by the family court was excessive under the circumstances. Husband testified at trial that his own attorney's and accountant's fees were $70,000, although the family court judge found in her order that he had incurred fees and costs of $58,998.24.

Wife's counsel is an accomplished family practitioner with an excellent reputation in the community. Particularly given the wide disparity in the parties' incomes, we do not believe it was error for the family court judge to have awarded Wife the entire amount of her attorney's fees and costs incurred in defending this action.

CONCLUSION

Accordingly, we affirm the family court judge's award of attorney's fees and costs, reverse her decision to treat Wife's credit card charges incurred after the date of filing as a debt subject to equitable division, reverse her decision to award Wife the marital home as part of her equitable division and direct that the home be sold, and remand the equitable division and alimony issues to the family court for further consideration consistent with this opinion.

CURETON J., concurs.

ANDERSON J., dissents in a separate decision.

ANDERSON, J. (dissenting): I respectfully dissent. In this domestic case, Thomas Durrette Wooten, Jr. (Husband) appeals from an order of the Family Court. The issues include identification of marital debt, equitable division of marital property, alimony, and attorney's fees and costs. I disagree with the analysis and reasoning of the majority. I vote to affirm in part, reverse in part, and modify in part.

FACTS/PROCEDURAL BACKGROUND

Husband and Mona Rae Wooten (Wife) were married in 1976. They have three children, all of whom are past the age of majority.

At the time of the marriage, Husband was on the verge of completing medical school at the Medical University of South Carolina and Wife was employed at the University as a nursing instructor. When Husband completed his residency, the parties moved to Columbia so Husband could take a job performing open heart surgery anesthetics.

After approximately one year, the parties moved to Mt. Pleasant. Soon thereafter, Husband and Wife purchased a home on Johns Island, where they lived throughout the duration of the marriage. Although the home, located on two acres of riverfront property, was "barely livable" at the time of the purchase, the parties renovated, restored, expanded, and otherwise improved the home. Eventually, the home became an integral part of the parties' lifestyles, particularly that of Wife. The parties did not travel extensively or host extravagant parties, but often entertained friends in the home and participated in boating and other recreational activities on the river. Husband and Wife purchased about twenty-four boats during the marriage, ranging in size from a jon boat to a thirty-five foot ocean-going fishing vessel.

Around February 10, 1999, Husband left the marital home and refused to tell Wife where he was planning to live. One month later, he informed the parties' marriage counselor he no longer loved his wife and only wanted to discuss division of their assets. On March 19, 1999, Husband underwent a vasectomy. Husband admitted he was romantically involved with Pam Perry, his then married co-worker, in April of 1999, although he denied any prior romantic involvement with her.

For a time immediately following the parties' separation, Husband paid Wife's expenses. After Husband told Wife she would have to start paying her bills from her own money, Wife began relying heavily on use of her credit cards to make purchases such as food and prescription drugs, and to pay college tuition for one of the parties' children.

Husband filed this action in June of 1999 seeking, inter alia, an order allowing him to live separate and apart from Wife and equitably apportioning the parties' marital property and debts. Wife answered and counterclaimed, seeking a divorce on the ground of adultery, possession and ownership of the marital home, equitable division of marital property, an award of alimony, and ancillary relief.

The Family Court heard the action over five days in April and May of 2000. The parties reached an agreement as to equal division of their personal property, such that the central issues remaining for adjudication at trial were alimony and the equitable division of marital property. The parties agreed on a fifty-fifty division of the marital estate.

The Family Court valued the parties' marital estate at $1,328,156. The principal assets consisted of the marital home, which had a fair market value of $675,000 and an equitable value of $539,349; Husband's $844,026 retirement accounts; Wife's $11,077 retirement plan; and Husband's $41,000 interest in his medical practice.

The Family Court granted Wife a divorce on the ground of adultery and determined the marital estate should be divided equally between the parties. To accomplish this division, the court awarded Wife full ownership of the marital home, together with its mortgage debt, her retirement account, and $137,395.50 from the husband's retirement accounts. The court awarded Husband his interest in his medical practice and the remainder of his retirement accounts, and allocated indebtedness to him totaling $83,552.50. The court found Wife was entitled to $4,300 per month in permanent periodic alimony, and $52,917.21 in attorney's fees and costs. Husband's post-trial motion for reconsideration was denied.

STANDARD OF REVIEW

On appeal from the Family Court, this Court has jurisdiction to find the facts in accordance with its own view of the preponderance of the evidence. Dearybury v. Dearybury, 351 S.C. 278, 569 S.E.2d 367 (2002); Hopkins v.

Hopkins, 343 S.C. 301, 540 S.E.2d 454 (2000); Murdock v. Murdock, 338 S.C. 322, 526 S.E.2d 241 (Ct. App. 1999). This tribunal, however, is not required to disregard the Family Court's findings. Heins v. Heins, 344 S.C. 146, 543 S.E.2d 224 (Ct. App. 2001); Badeaux v. Davis, 337 S.C. 195, 522 S.E.2d 835 (Ct. App. 1999). Likewise, we are not obligated to ignore the fact the Family Court judge, who saw and heard the witnesses, was in a better position to evaluate their testimony. Bowers v. Bowers, 349 S.C. 85, 561 S.E.2d 610 (Ct. App. 2002); Smith v. Smith, 327 S.C. 448, 486 S.E.2d 516 (Ct. App. 1997); see also Dorchester County Dep't of Soc. Servs. v. Miller, 324 S.C. 445, 477 S.E.2d 476 (Ct. App. 1996) (ruling that because appellate court lacks the opportunity for direct observation of witnesses, it should accord great deference to the Family Court's findings where matters of credibility are involved); Terwilliger v. Terwilliger, 298 S.C. 144, 378 S.E.2d 609 (Ct. App. 1989) (holding the resolution of questions regarding credibility and the weight given to testimony is a function of the Family Court judge who heard the testimony). Because the appellate court lacks the opportunity for direct observation of witnesses, it should accord great deference to trial court findings where matters of credibility are involved. Shirley v. Shirley, 342 S.C. 324, 536 S.E.2d 427 (Ct. App. 2000).

LAW/ANALYSIS

I. Credit Card Debt

Husband argues the Family Court erred in identifying $12,332 in credit card charges as marital debt subject to equitable division, and in allocating the debt to him, inasmuch as Wife incurred the debt after this action was commenced. I agree the debt should not have been allocated to Husband.

South Carolina Code Ann. § 20-7-472 (Supp. 2002) provides in pertinent part:

> In making apportionment, the court must give weight in such proportion as it finds appropriate to all of the following factors:

. . . .

> (13) liens and any other encumbrances upon the marital property, which themselves must be equitably divided, or upon the separate property of either of the parties, and any other existing debts incurred by the parties or either of them during the course of the marriage . . . .

Debts incurred for marital purposes are subject to equitable distribution. Jenkins v. Jenkins, 345 S.C. 88, 545 S.E.2d 531 (Ct. App. 2001). Section 20-7-472 creates a rebuttable presumption that a debt of either spouse incurred prior to marital litigation is a marital debt, and must be factored into the totality of equitable apportionment. Hickum v. Hickum, 320 S.C. 97, 463 S.E.2d 321 (Ct. App. 1995).

"Marital debt" has been defined as debt incurred for the joint benefit of the parties regardless of whether the parties are legally jointly liable for the debt or whether one party is legally individually liable. Thomas v. Thomas, 346 S.C. 20, 550 S.E.2d 580 (Ct. App. 2001), cert. granted, Jan. 24, 2002; Hardy v. Hardy, 311 S.C. 433, 429 S.E.2d 811 (Ct. App. 1993). In equitably dividing a marital estate, the Family Court is to consider the net estate, and must apportion marital debt in conjunction with the apportionment of assets. Hardy, 311 S.C. at 437, 429 S.E.2d at 813; see also Smith v. Smith, 327 S.C. 448, 486 S.E.2d 516 (Ct. App. 1997) (marital debt is a factor to be considered in making the equitable apportionment). Marital debt, like marital property, must be specifically identified and apportioned in equitable distribution. Smith, 327 S.C. at 457, 486 S.E.2d at 520 (section 20-7-472 implicitly requires that marital debt, like marital property, be specifically identified and apportioned in the equitable distribution); Frank v. Frank, 311 S.C. 454, 429 S.E.2d 823 (Ct. App. 1993). The same rules of fairness and equity which apply to the equitable division of marital property also apply to the division of marital debts. Hardy, 311 S.C. at 437, 429 S.E.2d at 813-14.

The burden of proving a spouse's debt as nonmarital rests upon the party who makes such an assertion. Hickum, 320 S.C. at 103, 463 S.E.2d at 324. If the trial judge finds that a spouse's debt was not made for marital purposes, it need not be factored into the court's equitable apportionment of the marital estate, and the trial judge may require payment by the spouse who created the debt for nonmarital purposes. Id.

Even where a spouse individually incurs debt after a marital separation but before a divorce decree is entered, the debt should be apportioned in accordance with the principles of equitable distribution where there is a showing that the debt was incurred for the joint benefit of both parties. See Peirson v. Calhoun, 308 S.C. 246, 417 S.E.2d 604 (Ct. App. 1992); see also Allen v. Allen, 287 S.C. 501, 339 S.E.2d 872 (Ct. App. 1986) (finding that while it is proper to consider marital debts in making an equitable distribution of marital assets, it is also incumbent upon the court which apportions such debts to ensure the debts were incurred for the joint benefit of the parties during the marriage).

In the instant case, Wife has made no showing, and I am unable to discern from the record on appeal, that the credit card debts she incurred during the parties' separation were incurred for any purpose inuring to the benefit of Husband. Rather, Wife testified she used her credit card to pay part of a college tuition bill for one of the parties' children and to buy medication, food, and clothing. While these were perhaps legitimate expenses, the resulting credit card debt was not, in my view, incurred for the joint benefit of the parties within the meaning of the governing statute and applicable case law. Moreover, these credit card charges were incurred by Wife subsequent to the filing of marital litigation. The court erred in considering the credit card charges as marital debt subject to equitable apportionment. Concomitantly, I agree with the majority's decision to reverse the portion of the Family Court's order allocating the credit card debt to Husband.

II. Marital Home

Husband asserts the Family Court erred in awarding Wife ownership of the marital home as part of her share in the marital estate. I disagree.

The Family Court is given broad jurisdiction in the equitable distribution of marital property. Murphy v. Murphy, 319 S.C. 324, 461 S.E.2d 39 (1995); see also Greene v. Greene 351 S.C. 329, 569 S.E.2d 393 (Ct. App. 2002) (holding Family Court has wide discretion in determining how marital property is to be distributed). The court may use any reasonable means to divide the property equitably. Bowyer v. Sohn, 290 S.C. 249, 349 S.E.2d 403 (1986); Belton v. Belton, 325 S.C. 456, 481 S.E.2d 174 (Ct. App. 1997); see also Coxe v. Coxe, 294 S.C. 291, 363 S.E.2d 906 (Ct. App. 1987) (stating Family Court judges are given broad jurisdiction in equitable distribution of marital property and trial judge may use any reasonable means to divide estate equitably). The apportionment of marital property is within the Family Court judge's discretion and will not be disturbed on appeal absent an abuse of discretion. Bowers v. Bowers, 349 S.C. 85, 561 S.E.2d 610 (Ct. App. 2002); Peirson v. Calhoun, 308 S.C. 246, 417 S.E.2d 604 (Ct. App. 1992).

In order to effect an equitable apportionment, the Family Court may require the sale of marital property and a division of the proceeds. Donahue v. Donahue, 299 S.C. 353, 384 S.E.2d 741 (1989); S.C. Code Ann. § 20-7-476 (Supp. 2002) (providing that "[t]he court in making an equitable apportionment may order the public or private sale of all or any portion of the marital property upon terms it determines."). The court, however, should first attempt an "in-kind" distribution of the marital assets. Donahue, 299 S.C. at 360, 384 S.E.2d at 745; Stevenson v. Stevenson, 295 S.C. 412, 368 S.E.2d 901 (1988). A Family Court may grant a spouse title to the marital home as part of the equitable distribution. Donahue, 299 S.C. at 360, 384 S.E.2d at 745. Pursuant to § 20-7-472(10) of the South Carolina Code, the court, in making apportionment, "must give weight in such proportion as it finds appropriate to all of the following factors: . . . (10) the desirability of awarding the family home as part of equitable distribution." S.C. Code Ann. § 20-7-472(10) (Supp. 2002).

Section 20-7-472 lists fifteen factors for the Family Court to consider when making an equitable apportionment of the marital estate. Bowers, 349 S.C. at 97, 561 S.E.2d at 616. The statute vests the Family Court with the discretion to decide what weight should be assigned to the various factors. Id. On review, this Court looks to the overall fairness of the apportionment, and if the result is equitable, that this Court might have weighed specific factors differently than the Family Court is irrelevant. Id.

In deciding to award Wife the marital home in partial realization of her share in the marital estate, the Family Court expressly weighed: the length of time the parties and their children resided in the home during the marriage; Wife's desire to remain in the home; and the central role the home played in the parties' lifestyles during the marriage. As well, the court considered the fact that Wife's deceased father personally performed much of the woodwork on the home during the process of renovation. Pointedly, the court specifically noted that it "could not award the marital home to the Wife no matter how desirable unless it were a part of the fifty percent (50%) of the marital estate to which she is entitled."

Under these facts and circumstances, there is no error or abuse of discretion in the Family Court's decision to award Wife the marital home instead of ordering its sale. I am particularly convinced of the propriety of the court's decision in this regard in light of Husband's vastly superior income and ability to purchase a home without the necessity of divesting Wife of the marital home.

III. Tax Ramifications

Husband claims the Family Court erred in failing to consider the tax consequences in the division of the marital estate. I disagree.

In Ellerbe v. Ellerbe, 323 S.C. 283, 473 S.E.2d 881 (Ct. App. 1996), the Court of Appeals analyzed tax issues in connection with equitable apportionment and stated:

> South Carolina Code Ann. § 20-7-472(11) (Supp. 1995) requires the family court to consider the tax consequences to each party resulting from equitable apportionment. However, if the apportionment order does not contemplate the liquidation or sale of an asset, then it is an abuse of discretion for the court to consider the tax consequences from a supposed sale or liquidation. See Graham v. Graham, 301 S.C. 128, 390 S.E.2d 469 (Ct. App. 1990); see also Roe v. Roe, 311 S.C. 471, 429 S.E.2d 830 (Ct. App. 1993). Moreover, a transfer of these funds from one party to the other as a part of an equitable division should not result in a tax consequence. Josey v. Josey, 291 S.C. 26, 351 S.E.2d 891 (Ct. App. 1986). Here, the parties were awarded their respective accounts. Because we see no need for the accounts to be liquidated, we hold the family court erred in valuing the parties' retirement accounts at 48% of their face values. In redetermining equitable distribution, the family court shall consider the face values of the parties' retirement accounts.

Id. at 289, 473 S.E.2d at 884-85.

After Ellerbe, this Court, in Bowers v. Bowers, 349 S.C. 85, 561 S.E.2d 610 (Ct. App. 2002), examined tax effects as applied to the valuation and distribution of the husband's 401(k) account. Bowers explicates:

> We further find no error in the Family Court's failure to expressly consider tax consequences resulting from its award to Wife of one-half the value of Husband's 401(k) account. Where an order of equitable apportionment does not contemplate the liquidation or sale of an asset, it is an abuse of discretion for the court to consider the tax consequences from a supposed sale or liquidation. Ellerbe v. Ellerbe, 323 S.C. 283, 473 S.E.2d 881 (Ct. App. 1996). Here, the court's order does not require or contemplate liquidation of Husband's 401(k) account and there is no evidence indicating either party anticipated liquidation of the account.

Id. at 97-98, 561 S.E.2d at 617.

I reject the contention by Husband that the apportionment of marital property in the case sub judice contemplates the liquidation or sale of an asset. The court's order does not require or contemplate liquidation of Husband's retirement accounts or the sale of the house. Husband asseverates that, in actuality, he will be required to liquidate either the retirement accounts or to sell the house or both in an attempt to comply financially with the court's distribution.

In contrariety to Husband's argument, there is no evidence indicating he will be required to engage in a liquidation of the retirement accounts or to sell the house, other than his self-serving assertions. The Family Court did not err in failing to expressly consider tax consequences resulting from its award to Wife of the house.

IV. Alimony

Husband contends the Family Court's award to Wife of $4,300 per month in permanent periodic alimony was excessive. I agree.

The decision to grant or deny alimony rests within the discretion of the Family Court judge. Dearybury v. Dearybury, 351 S.C. 278, 569 S.E.2d 367 (2002); Clardy v. Clardy, 266 S.C. 270, 222 S.E.2d 771 (1976); Hatfield v. Hatfield, 327 S.C. 360, 489 S.E.2d 212 (Ct. App. 1997). The judge's discretion, when exercised in light of the facts of each particular case, will not be disturbed on appeal absent abuse thereof. Dearybury, 351 S.C. at 282, 569 S.E.2d at 369; Long v. Long, 247 S.C. 250, 146 S.E.2d 873 (1966). An abuse of discretion occurs when the judge is controlled by some error of law or where the order, based upon findings of fact, is without evidentiary support. Sharps v. Sharps, 342 S.C. 71, 535 S.E.2d 913 (2000); Stewart v. Floyd, 274 S.C. 437, 265 S.E.2d 254 (1980).

Alimony is a substitute for the support which is normally incident to the marital relationship. Donahue v. Donahue, 299 S.C. 353, 384 S.E.2d 741 (1989); Morris v. Morris, 335 S.C. 525, 517 S.E.2d 720 (Ct. App. 1999);

Johnson v. Johnson, 296 S.C. 289, 372 S.E.2d 107 (Ct. App. 1988). Generally, alimony should place the supported spouse, as nearly as is practical, in the same position of support he or she enjoyed during the marriage. Allen v. Allen, 347 S.C. 177, 554 S.E.2d 421 (Ct. App. 2001); McElveen v. McElveen, 332 S.C. 583, 506 S.E.2d 1 (Ct. App. 1998). It is the duty of the Family Court to make an alimony award that is fit, equitable, and just if the claim is well founded. Hinson v. Hinson, 341 S.C. 574, 535 S.E.2d 143 (Ct. App. 2000); Woodward v. Woodward, 294 S.C. 210, 363 S.E.2d 413 (Ct. App. 1987). Alimony should not, however, serve as a disincentive for spouses to improve their employment potential or to dissuade them from providing, to the extent possible, for their own support. Williamson v. Williamson, 311 S.C. 47, 426 S.E.2d 758 (1993); McElveen v. McElveen, 332 S.C. 583, 506 S.E.2d 1 (Ct. App. 1998); Brandi v. Brandi, 302 S.C. 353, 396 S.E.2d 124 (Ct. App. 1990).

In making an award of alimony, the following factors must be considered and weighed: (1) the duration of the marriage and ages of the parties at the time of the marriage and at the time of the divorce; (2) the physical and emotional condition of each spouse; (3) the educational background of each spouse, together with the need of each spouse for additional training or education in order to achieve that spouse's income potential; (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 properties of the parties, including those apportioned to him or her in the divorce or separate maintenance action; (9) custody of the children; (10) marital misconduct or fault of either or both parties if the misconduct has affected the economic circumstances of the parties, or contributed to the breakup of the marriage; (11) tax consequences; (12) existence of any support obligations from a prior marriage; and (13) such other factors the court considers relevant. Dearybury, 351 S.C. at 282-83, 569 S.E.2d at 369; Patel v. Patel, 347 S.C. 281, 555 S.E.2d 386 (2001); S.C. Code Ann. § 20-3-130(C) (Supp. 2002). No one factor is dispositive. Lide v. Lide, 277 S.C. 155, 283 S.E.2d 832 (1981); Allen, 347 S.C. at 184, 554 S.E.2d at 425.

I am compelled to agree with Husband that, in this case, the Family Court arrived at an excessive amount in determining Wife's award of alimony. At the time of trial, Husband was fifty-one years old and earned about $217,000 annually. Wife was fifty-two years old, employed as a Deputy Coroner for Charleston County, and earned approximately $47,000 annually, or $3,924 per month. According to Wife's financial declaration, her total monthly expenses (including, inter alia, the mortgage on the marital home, $250 for anticipated credit card payments, $300 for anticipated lien payments on a new car, and a $789 entertainment expense) amount to about $5,730 per month. Consequently, the Family Court's award of $4,300 per month to the wife in alimony, added to her net monthly income of $2,552, would afford her a monthly income of $6,852, thereby exceeding her needs by approximately $1,122 per month.

Although Wife established entitlement to alimony, the amount of the Family Court's award is excessive and amounts to an abuse of discretion. Accordingly, I vote to reverse the amount of alimony awarded and modify the Family Court's order to reduce the award of permanent periodic alimony to $3,000 per month.

V. Attorney's Fees and Costs

Husband maintains the Family Court erred in ordering him to contribute $52,917.21 towards Wife's attorney's fees and costs. I disagree.

Under South Carolina Code Ann. § 20-3-130(H) (Supp. 2002), the judge may order one party to pay a reasonable amount to the other for attorney's fees and costs incurred in maintaining an action for divorce. Smith v. Smith, 327 S.C. 448, 486 S.E.2d 516 (Ct. App. 1997). An award of attorney's fees will not be overturned absent an abuse of discretion. Stevenson v. Stevenson, 295 S.C. 412, 368 S.E.2d 901 (1988); Shirley v. Shirley, 342 S.C. 324, 536 S.E.2d 427 (Ct. App. 2000); see also Woodall v. Woodall, 322 S.C. 7, 471 S.E.2d 154 (1996) (award of attorney's fees and costs is within sound discretion of Family Court judge). Before awarding attorney's fees, the Family Court should consider (1) each party's ability to

pay his or her own fee; (2) the beneficial results obtained by the attorney; (3) the parties' respective financial conditions; and (4) the effect of the attorney's fee on each party's standard of living. E.D.M. v. T.A.M., 307 S.C. 471, 415 S.E.2d 812 (1992); Heins v. Heins, 344 S.C. 146, 543 S.E.2d 224 (Ct. App. 2001). In determining the amount of attorney's fees to award, the court should consider: (1) the nature, extent, and difficulty of the services rendered; (2) the time necessarily devoted to the case; (3) counsel's professional standing; (4) the contingency of compensation; (5) the beneficial results obtained; and (6) the customary legal fees for similar services. Glasscock v. Glasscock, 304 S.C. 158, 403 S.E.2d 313 (1991); Bowers v. Bowers, 349 S.C. 85, 561 S.E.2d 610 (Ct. App. 2002).

Here, Husband abandoned the marital home, began an adulterous affair, refused to participate in marital counseling in any meaningful way, rejected Wife's attempts at reconciliation, and decided to commence marital litigation, thereby putting Wife to the task of defending against the action. In addition, the issues of equitable apportionment and distribution were highly contested at trial and, notwithstanding this Court's modifications to the Family Court's order on appeal, Wife's attorney obtained several beneficial results on her behalf, including an award of divorce on the ground of adultery and an equal division of the marital estate.

Having reviewed the award of attorney's fees in light of the applicable factors, I conclude the Family Court did not abuse its discretion. There is sufficient evidentiary support in the record to uphold the judge's award of attorney's fees.

CONCLUSION

I vote to reverse the Family Court's order identifying $12,332 in credit card charges as marital debt subject to equitable division, and in allocating the debt to Husband. Wife made no showing and the record did not reveal that the credit card debts Wife incurred during the parties' separation were incurred for any purpose inuring to the benefit of Husband. Moreover, these credit card charges were incurred by Wife subsequent to the filing of marital litigation. Thus, the debt should not have been allocated to Husband.

Although Wife established entitlement to alimony, the amount of the Family Court's award is excessive and amounts to an abuse of discretion. Accordingly, I vote to reverse the amount of alimony awarded and modify the Family Court's order to reduce the award of permanent periodic alimony from $4,300 to $3,000 per month.

The court did not err in awarding Wife the marital home in partial realization of her share in the marital estate. In addition, the Family Court properly ordered Husband to contribute $52,917.21 towards Wife's attorney's fees and costs. I vote to affirm the judge's rulings regarding the marital home and the award of attorney's fees and costs.

For the foregoing reasons, I vote to affirm in part, reverse in part, and modify in part.